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THE LONG ROAD TO PARODY EXCEPTION IN HUNGARIAN COPYRIGHT LAW – AN EXPLORER'S LOG

I. INTRODUCTION

There is a saying in the Hungarian language, which is used when one encounters a joke which is offensive or unfunny for some reason. In such a scenario, it is not unusual to say "I get the joke, I just don't like it." This saying perfectly sums up the previous, long dominant standpoint in Hungarian copyright law and Hungarian legal literature on the parody exception in copyright law – we understand it, we just don't like it.

Personally I have always found this approach puzzling. My presumption was – and still is – that uses of parody are not just a form of being funny, they are most important in two ways. First, parody serves the constitutional right of freedom of expression,[1] in a form of humorous and/or mocking adaptations of works that are – in many instances – protected by copyright law. Second, parody (and the parody exception) are crucial to incentivise creativity,[2] which is obviously an important purpose[3] of copyright legal regimes as well.

This long dominant standpoint opposing the parody exception came to a collision course with the European Union's CDSM Directive.[4] In contrast with the 20 years old authorization in Art. 5(3)k of the InfoSoc Directive[5] – the transposition of which was optional, and which was not transposed in Hungary –, Art. 17(7) of the CDSM Directive makes it mandatory for Member States to transpose the parody exception in their national copyright

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1 Andres Guadamuz: Living in a Remixed World: Comparative Analysis of Transformative Uses in Copyright Law. In: Lilian Edwards – Burkhard Schafer – Edina Harbinja (ed.): Future Law – Emerging Technology, Regulation and Ethics. Edinburgh University Press, 2020. p. 356. In this paper, sources referred to in hyperlink were uniformly last accessed on at 1 March, 2022.

2 Christina Bohannan: Reclaiming Copyright. Cardozo Arts & Entertainment Law Journal, Vol. 23, 2006. p. 609.

3 Ujhelyi Dávid: A szerzői jog célja és emberképe a szellemi alkotásokat megalapozó elméletek tükrében. Industrial Property and Copyright Review, 2014/5. pp. 34–52. Available at: *https://goo.gl/IPYzaG*.

4 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=EN*.

5 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029&from=EN*.

regime (even if only in the context of the right of communication to the public of online content sharing services).

Thus, the Hungarian legislator found itself in an interesting position: the legal literature did not find parody valuable, worthy enough to be transposed as an exception for decades, but as of 6 June 2021 Hungarian copyright law had to find a place for the parody exception, one way or another. This situation was not just an intellectual challenge: the use of parody raises many relevant questions in copyright law in connection with moral rights,[6] the range of exclusive rights involved, the definition of parody and so on. So, this situation was also a unique opportunity to take a look at different legal systems, examine their scientific approach and judicial practice concerning parody in copyright law, and create an exception that distils the knowledge and experience of several decades. It was also an opportunity to readjust, fine tune the balance[7] between authors and users, which is one of the main goals of copyright legislation.

This paper aims to present three topics that are relevant and in connection with parody and their copyright approach, but are not so widely researched and therefore relatively hard to access. Thus, this paper in Chapter II will present the European Union (EU) copyright regime's standpoint and case law concerning parody. Chapter III aims to explore connections and potential collisions between uses of parody and moral rights. Chapter IV will shed light on the long dominant standpoint of Hungarian legal literature on parody and the critique of this approach. Chapter V will highlight every relevant factor that should be considered during the legislative process of a new exception in copyright law and specifically the parody exception, and it will also examine the final version of the transposed Hungarian parody exception in detail, analysing the building blocks that finally make the use of parody free use in the Hungarian copyright regime. Chapter VI will provide a brief conclusion.

Last but not least, it must be noted that while relevant to the subject, this paper will not present the international copyright framework[8] or the legal approach and case law of the United States concerning parody. This is because the international copyright regime does not cover parody specifically, and while the three-step test is a basic and general framework to interpret every exception in copyright law, my previous research indicates that the uses of parody generally seem to be conform with the test's requirements (moral rights play an interesting role here, but this specific aspect will be discussed later in this paper). The United States has a huge number of relevant cases and a very interesting regulatory system

6 Faludi Gábor: A paródia a szerzői jogban. In: Kőhidi Ákos – Keserű Barna Arnold (ed.): Tanulmányok a 65 éves Lenkovics Barnabás tiszteletére. Győr; Budapest: Eötvös József Könyv- és Lapkiadó, 2015. p. 117.

7 Christophe Geiger – Elena Izyumenko: Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression. International Review of Intellectual Property and Competition Law, Vol. 45, 2014. pp. 326–339.

8 See also: Peter K. Yu: Digital copyright and the parody exception in Hong Kong. Media Asia, Vol. 21, 2014. p. 121.

concerning parody, but this topic is extensively researched and widely available for interested researchers.

II. THE LEGAL APPROACH OF THE EUROPEAN UNION TO PARODY IN A NUTSHELL

Currently, the EU's law has two directives which sought to horizontally[9] reform the EU copyright framework,[10] the InfoSoc Directive – which was transposed in Hungary before its accession to the EU – and the CDSM Directive, which was transposed on 1 June 2021.

II.1. The InfoSoc Directive

The codification of the InfoSoc Directive was aimed to reach a number of parallel objectives, such as "*to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe*", but ensuring a high level of intellectual property protection[11] and preventing the fragmentation of national legislations[12] were also important. The direct antecedents of the source of law are the World Intellectual Property Organisation's (WIPO) Internet Treaties, as stated in recital (15) of the InfoSoc Directive, which sets out that the Directive also serves to implement the WIPO's Internet Treaties.

Of the economic rights, the InfoSoc Directive only regulates the right of reproduction, distribution and communication to the public.[13] However, these exclusive rights are relatively broadly defined in order to achieve a high level of protection.[14] At the same time, the InfoSoc Directive regulates exceptions and limitations as well (in the context of the mentioned economic rights). The parody exception appears here for the first time in EU law, in the form of an explicit, independent form of free use (as opposed to being interpreted under another form of free use, e.g. quotation).[15] The InfoSoc Directive regulates two kinds

[9] Jakub Halek – Martin Hrachovina: Directive on Copyright in the Digital Single Market: A Challenge for the Future. Common Law Review, Iss. 16, 2020. p. 44.

[10] Grad-Gyenge Anikó: A szerződési jog harmonizációja rendelettel: új utak a szerzői jogi harmonizációban. In: Grad-Gyenge Anikó – Kabai Eszter – Menyhárd Attila (ed.): Liber Amicorum – Studia G. Faludi Dedicata: Ünnepi tanulmányok Faludi Gábor 65. születésnapja tiszteletére. ELTE Eötvös Kiadó, Budapest, 2018. p. 130.

[11] Christophe Geiger – Elena Izyumenko: The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking. American University International Law Review, Vol. 32, No. 1, 2016. pp. 48, 88.

[12] InfoSoc Directive, recitals (1), (4) and (6)–(7).

[13] Id. Art. 2–4.

[14] Christophe Geiger – Elena Izyumenko: Towards a European Fair Use Grounded in Freedom of Expression. American University International Law Review, Vol. 35, No. 1, 2019. p. 3.

[15] Mezei Peter: Fair Use and Culture: Comments on the Gowers Review. University of Toledo Law Review, Vol. 39, No. 3, 2008. p. 659.

of exceptions, mandatory and optional,[16] which is why the directive has been criticized because the optional exceptions – as a summary list of national exceptions – have not achieved real harmonization, while leaving open the possibility for Member States to transpose the exceptions in various ways.[17]

The parody exception of the InfoSoc Directive[18] provides an exception from the exclusive right of reproduction, communication to the public and distribution[19] if the use is for the purpose of caricature, parody or pastiche. The Directive does not give the national legislator or users much guidance on the specific conditions of free use. In light of this, it does not seem surprising that a study – made at the request of the European Commission (hereinafter Commission) – revealed a number of differences in Member States' solutions of transposing Art. 5(3)(k) of the InfoSoc Directive.[20]

It caused difficulties in interpretation that in many Member States, including Hungary, parody uses are primarily (but not exclusively) interpreted as uses affecting the right of adaptation. However, EU law, with the exception of the Software Directive and the Database Directive,[21] has not harmonized this specific economic right,[22] nor is it one of the exclusive rights covered by the InfoSoc Directive. In this situation, in our view, the relevant directives should be interpreted so that the InfoSoc Directive provides for an exemption from the exclusive rights of reproduction and communication to the public, while the EU legislator leaves this aspect of the partially harmonized adaptation right[23] in the hands of the national legislator.[24]

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16 Ilanah Fhima: Fairness in Copyright Law: An Anglo-American Comparison. Santa Clara High Technology Law Journal, Vol. 34, No. 1, 2017. pp. 48–49.

17 Eleonora Rosati: Non-Commercial Quotation and Freedom of Paranorma. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, Vol. 8, No. 4, 2017. p. 312.

18 InfoSoc Directive Art. 5. "(3) Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
(k) use for the purpose of caricature, parody or pastiche;".

19 For the latter, see Art. 5(4) of the InfoSoc Directive.

20 Jean-Paul Triaille (ed.): Study on the application of Directive 2001/29/EC on copyright and related rights in the information society. De Wolf & Partners, 2013. p. 481. Available at: *https://op.europa.eu/en/publication-detail/-/publication/9ebb5084-ea89-4b3e-bda2-33816f11425b*.

21 See Art. 4(1)(b) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Software Directive) and Art. 5(b) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive).

22 Daniël Jongsma: Parody after Deckmyn. A comparative overview of the approach to parody under copyright law in Belgium, France, Germany and the Netherlands. International Review of Intellectual Property and Competition Law, Vol. 48, 2017. p. 665.

23 For the sake of completeness, it is necessary to point out that not all Member States recognize the right of reproduction as an independent right (cf. Section 29 of the Hungarian Copyright Act).

24 The same conclusion is reached: Christina Angelopoulos – Joao Pedro Quintais: Fixing Copyright Reform. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, Vol. 10, No. 2, 2019. pp. 150–151.

II.2. The CDSM Directive

The InfoSoc Directive set the direction for copyright harmonisation for decades, but over time its revision became inevitable. One of the first steps in this direction is the Commission's 2012 Communication entitled "*A coherent framework for building trust in the Digital Single Market for e-commerce and online services*",[25] which already envisaged a revision of the InfoSoc Directive to ensure the effectiveness of the Single Market.[26] A year later, a Commission-initiated study assessing the potential economic impact of copyright exceptions and limitations found that changes in the distribution channels of new digital uses and copyrighted works could justify the addition of new exceptions to EU copyright law and also provided findings about the parody exception.[27]

However, the strategy for a comprehensive reform of the copyright framework had to wait until 2015, when the Commission published its Digital Single Market Strategy for Europe (DSMS).[28] DSMS planned to realize its vision for the Digital Single Market based on three pillars: firstly, better consumer and business access to Internet services, secondly, to ensure a fair and level playing field for digital networks and innovative services, and thirdly, to maximize the growth potential of the digital economy.[29]

The second pillar's proposals for action, among other things, envisage the creation of a more modern and European copyright framework,[30] and the Commission's Communication "*Towards a modern, more European copyright framework*",[31] also published in 2015, sets out these ideas in detail. In this context, the reform of the EU copyright regime must be based on the premise of increasing accessibility, a high level of protection and a balance between stakeholders, adapting regulation to technological developments since the adoption

[25] European Commission: A coherent framework for building trust in the Digital Single Market for e-commerce and online services. COM(2011) 942 final, 11 November 2012. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0942&from=en*.

[26] Id. 17–18. See also: Tóth Andrea Katalin: Az európai szerzői jogi harmonizáció és a territorialitás kérdése. Industrial Property and Copyright Review, 2016/4. p. 17. Available at: *https://www.sztnh.gov.hu/sites/default/files/files/kiadv/szkv/szemle-2016-04/02.pdf*

[27] Gregor Langus – Damien Neven – Gareth Shier: Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU. Charles River Associates, 2013. pp. 6, 20. Available at: *https://op.europa.eu/en/publication-detail/-/publication/5092b309-660e-48d7-a984-390ebb549062*

[28] European Commission: A Digital Single Market Strategy for Europe. COM(2015) 192 final, 6 May 2015. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0192&from=EN*.

[29] Id. 4, 9. and 14. See also: Maria Jose Schmidt-Kessen: EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs and Benefits of Partitioning EU's Internal Market. Columbia Journal of European Law, Vol. 24, No. 3, 2018. p. 563.

[30] Id. Subsection 2.4.

[31] European Commission: Towards a modern, more European copyright framework. COM(2015) 626 final. 9 December 2015. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0626&from=EN*.

of the InfoSoc Directive, and ensuring an efficient distribution of royalties.[32] At the same time, it is worth noting that neither the DSMS, nor the 2015 Communication addresses the issue of parody,[33] although the so-called Reda Report adopted not much earlier by the European Parliament addresses parody as a key issue, as follows "*The European Parliament* […] *Emphasises the importance of the exception for caricature, parody and pastiche as a factor in the vitality of democratic debate; believes that the exception should strike the balance between the interests and rights of the creators and original characters and the freedom of expression of the user of a protected work who is relying on the exception for caricature, parody or pastiche.*"[34]

During his 2016 annual evaluation speech, Jean-Claude Juncker, then President of the Commission, announced in a press release[35] that the Commission, aiming to realize the goals of the DSMS, had proposed a directive to reform the copyright framework in response to the challenges caused by digitalization and new online services – the proposed directive was the first public version of the later CDSM Directive.

The primary goal of the DSM proposal[36] was therefore to reform the copyright framework established by the InfoSoc Directive,[37] to adapt the legal framework to the needs of the digital age,[38] and to provide the tools and measures[39] needed to extend the digital single

32 Id. 6, 9. and 12–13.

33 Tóth Andrea Katalin: Szerzői jogi reform az Európai Unióban. Industrial Property and Copyright Review, 2017/4. p. 11. Available at: *https://www.sztnh.gov.hu/sites/default/files/files/kiadv/szkv/szemle-2017-04/01-tothandrea.pdf*.

34 European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. 9 July 2015. (2014/2256(INI)). Point 47. Available at: *https://op.europa.eu/en/publication-detail/-/publication/f1932fdc-7e5e-11e7-b5c6-01aa75ed71a1/language-en*.

35 European Commission: State of the Union 2016: Commission proposes modern EU copyright rules for European culture to flourish and circulate. Press release, 14 September 2016. Available at: *https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3010*.

36 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (DSM proposal). COM(2016) 593 final, 14 September 2016. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN*.

37 Giancarlo F. Frosio: Internet Intermediary Liability: WILMap, Theory and Trends. Indian Journal of Law and Technology, Vol. 13, No. 1, 2017. p. 31. and Giovanni De Gregorio: Expressions on Platforms: Freedom of Expression and ISP Liability in the European Digital Single Market. European Competition and Regulatory Law Review, Vol. 2, No. 3, 2018. p. 210.

38 Tóth Andrea Katalin: A linkelés jelene és jövője az Egyesült Államok és az Európai Unió joggyakorlata alapján. Industrial Property and Copyright Review, 2016/1. p. 74, 84. Available at: *https://www.sztnh.gov.hu/sites/default/files/files/kiadv/szkv/szemle-2016-01/03-t-thandrea.pdf*.

39 Giancarlo F. Frosio: To Filter, or Not to Filter - That Is the Question in EU Copyright Reform. Cardozo Arts & Entertainment Law Journal, Vol. 36, No. 2, 2018. p. 334.

market, including measures concerning digitalization and cross-border accessibility.[40] Although the need for modernization alone was not disputed, the DSM proposal has met with strong opposition[41] and has become the most controversial proposal in EU copyright law, with petitions signed by more than five million people[42] and protests in several countries. In the weeks leading up to the final vote,[43] the "people of the internet" saw the twilight of the meme age in the proposal,[44] and confidence in the legislative process was not strengthened by the fact that the negotiation process was surrounded by extremely strong lobbying.[45]

The CDSM Directive was finally adopted on 17 May 2019 after lengthy discussions,[46] with significantly more detailed regulations than the DSM proposal. One of the most controversial provisions in both the proposal and the final version is the provision to address[47] the *value gap problem*.[48] The essence of this provision is that content-sharing service providers whose activity is based on the sharing of copyrighted content uploaded by users – such as YouTube –, although they generate very significant revenue from their activities, rightholders receive only a disproportionately small and indirect share of these revenues.[49] These content-sharing service providers, as they only play an intermediary role and therefore did not carry out uses under exclusive rights directly under the pre-CDSM approach, have been granted a special exemption under the E-Commerce Directive,[50] provided that

40 Christophe Geiger – Giancarlo Frosio – Oleksandr Bulayenko: Facilitating Access to Out-of-Commerce Works in the Digital Single Market - How to Make Pico della Mirandola's Dream a Reality in the European Union. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, Vol. 9, No. 3, 2018. p. 242.

41 Eleonora Rosati: Copyright and the Court of Justice of the European Union. Oxford University Press, 2019. p. 215.

42 Thomas Spoerri: On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, Vol. 10, No. 2, 2019. p. 174.

43 Markus Reuter: Protests against Copyright Directive: All Cities, Dates and Numbers of Participants across Europe. Netzpolitik.org, March 25, 2019. Available at: *https://netzpolitik.org/2019/protests-against-copyright-directive-all-cities-dates-and-numbers-of-participants-across-europe/*.

44 Jasper Hamill: EU votes for copyright law which could kill memes and introduce 'automated surveillance and control' of the internet. Metro.co.uk, June 20, 2018. Available at: *https://metro.co.uk/2018/06/20/eu-votes-copyright-law-kill-memes-introduce-automated-surveillance-control-internet-7647997/*.

45 Sallie Spilsbury: Rewriting the Rule Book: The Latest on the Draft Copyright Directive. Entertainment and Sports Law Journal, Vol. 17, 2019. p. 1.

46 Halek – Hrachovina (2020) 44.

47 Martin Husovec: The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown: Which Is Superior: And Why. Columbia Journal of Law & the Arts, Vol. 42, No. 1, 2018. p. 63.

48 See more: Adam Freeland: Negotiating under the New EU Copyright Directive 2019/790 and GDPR. Journal of International Economic Law, No. 24, Iss. 1, 2020. p. 106–109.

49 Daniel L. Lawrence: Addressing the Value Gap in the Age of Digital Music Streaming. Vanderbilt Journal of Transnational Law, Vol. 52, No. 2, 2019. p. 522.

50 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=EN*.

they comply with the obligations under the notice-and-takedown procedure.[51] However, practice has shown that for some high-profile providers, the exemption rules in the E-Commerce Directive were not effective and required special, stricter regulation.

The Court of Justice of the European Union (CJEU) tried to remedy this problem by developing the doctrine of "*new public*" and shaping it from judgment to judgment,[52] but legislation in the form of directives can certainly be considered a more appropriate tool to address the issue. The CDSM Directive classifies[53] such activity as a specific, new form of communication to the public, but not as a separate, *sui generis* right. The new form of communication to the public provides grounds for claiming remuneration as well.[54] Exemption from liability in the case of a content-sharing service provider will no longer be based on a notice-and-takedown procedure,[55] but on the much stricter[56] notice-and-staydown procedure,[57] under which service providers will be required to actively filter[58] (but not monitor) certain content.[59]

However, Art. 17(7) of the CDSM Directive states that the new system of direct liability[60] may not prevent the use of exceptions or limitations. In this context, Member States shall ensure that users have the opportunity to make free use of citation, critique, review or the

51 E-Commerce Directive Art. 14.

52 See e.g. C–117/15. Reha Training v. GEMA (available at: *http://curia.europa.eu/juris/liste.jsf?num=C-117/15*), C–138/16. AKM v. Zürs.net (available at: *http://curia.europa.eu/juris/liste.jsf?language=en&num=c-138/16*), C–610/15. Stichting Brein v. Ziggo BV (available at: *http://curia.europa.eu/juris/liste.jsf?num=C-610/15*), C–161/17. Land Nordrhein-Westfalen v. Renckhoff (available at: *http://curia.europa.eu/juris/liste.jsf?num=C-161/17*).

53 It is necessary to point out that, although some of the decisions of the CJEU (see e.g. C-610/15. Stichting Brein v. Ziggo BV) provide a precedent for the solution set out in the CDSM Directive, in our opinion, prior to the EU copyright reform, neither EU law nor the Hungarian Copyright Act indicated that the use of content-sharing service providers should or could be considered as direct communication to the public.

54 CDSM Directive Art. 17(1).

55 Bartóki-Gönczy Balázs: A tárhelyszolgáltatók felelőssége a jogsértő tartalmakért – különös tekintettel a francia bíróságok gyakorlatára. Iustum Aequum Salutare, 2011/3. p. 126. Available at: *http://ias.jak.ppke.hu/hir/ias/20113sz/14.pdf*.

56 De Gregorio (2018) 204.

57 Kristofer Erickson – Martin Kretschmer: This Video Is Unavailable. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, Vol. 9, No. 1, 2018. p. 80.

58 The legal literature also raises the question of whether "humourless" filtering algorithms will be able to identify parodies that are covered by the exception, and thus works could be used without permission, see Lia Shikhiashvili: The Same Problem, Different Outcome: Online Copyright Infringement and Intermediary Liability under US and EU Laws. Intellectual Property and Technology Law Journal, No. 24, Iss. 1, 2019. p. 141.

59 CDSM Directive 17(4). See also: Felipe Romero-Moreno: Notice and Staydown and Social Media: Amending Article 13 of the Proposed Directive on Copyright. International Review of Law, Computers & Technology, Vol. 33, Iss. 2, 2019. pp. 187–210.

60 Laura Rozenfeldova – Pavol Sokol: Liability Regime of Online Platforms New Approaches and Perspectives. EU and Comparative Law Issues and Challenges Series, Vol. 3, 2019. pp. 870–873.

making of a caricature, parody or pastiche.[61] In support of this, recital (70) of the CDSM Directive states the following from a fundamental rights point of view.

> „*The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes.* […]"

Thus, the CDSM Directive made the transposition of certain exceptions already known in the InfoSoc Directive mandatory[62] – even if only in the context of communication to the public, or more precisely communication to the public by content-sharing service providers –, therefore Art. 17(7) is of paramount importance concerning parody. The CDSM Directive narrows the national legislator's discretion: Member States can only decide whether they would like to transpose the exception in its entirety as authorized by the InfoSoc Directive, or only provide for an exception covering communication to the public by content-sharing service providers.

In this regard, it may be difficult to interpret that, while Art. 17 of the CDSM Directive was not intended to create a *sui generis* exclusive right but to extend the interpretation of the existing right of communication to the public,[63] the authorization in Art. 17(7) refers

61 Gerald Spindler: The Liability System of Art. 17 DSMD and National Implementation: Contravening Prohibition of General Monitoring Duties. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, Vol. 10, No. 3, 2019. p. 369.

62 Joho Pedro Quintais – Giancarlo Frosio – Stef van Gompel – P. Bernt Hugenholtz – Martin Husovec – Bernd Justin Jutte – Martin Senftleben: Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, Vol. 10, No. 3, 2019. p. 278.

63 Although the Commission's consultation on Article 17 seems to have outlined the opposite approach, see European Commission: Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market, 2020. Available at: *https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591*.

only to the obligation to ensure free uses – including the parody exception – in connection with content-sharing service providers. So, to what extent does the CDSM Directive make the transposition of the exceptions listed in Art. 17(7) mandatory? In our view, as the uses of content-sharing service providers are to be considered as communication to the public, the provision applies to the right of communication to the public as a whole, not only in a narrow sense. Otherwise, if the national legislator wished to transpose the exception to the narrowest extent required by the CDSM Directive, it could transpose the free use covering only communication to the public by content-sharing service providers, which would be contrary to Art. 17 and the interpretation of the right of communication to the public set out above.

II.3. The CJEU's decision in C-201/13. Deckmyn

II.3.1. Findings and Significance of the Deckmyn decision

Over the past five years, the CJEU has increasingly interpreted EU law more freely and flexibly in its judgments in the field of copyright.[64] The decision in the *Deckmyn case*,[65] which deals with the EU copyright regime's standpoint on parody, also fits into this trend without question.

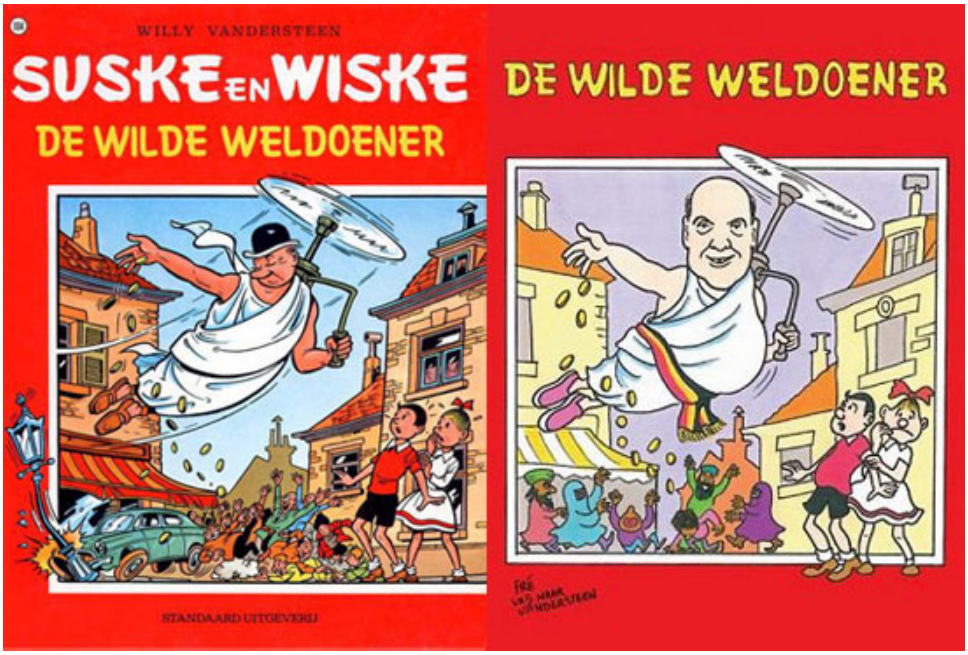
According to the facts of the dispute in the main proceedings, Johan Deckmyn, a member of the political party Vlaams Belang, distributed calendars to those present at a ceremony on 9 January 2011. The cover of the calendars in question featured an adaptation of the 1961 issue of the comic *Suske en Wiske* (the specific issue was titled *De Wilde Weldoener*), created by the famous and well-known Belgian comic book artist Willebord Vandersteen.[66] The cover shows the then mayor of the city of Ghent, Daniël Termont, scattering money among ladies dressed in shrouds and men of colour wearing turbans[67] in very similar circumstances to the original work, while white-skinned young people watched the scene with astonishment and concern, also similar to the children depicted in the original work.

64 See e.g. the decisions in C-466/12. Svensson v. Retriever Sverige AB (available at: *http://goo.gl/SpD6Ls)*, C-348/13. BestWater International GmbH v. Michael Mebes (available at: *http://goo.gl/ydqSVU*), C-160/15. GS Media BV v Sanoma Media Netherlands BV (available at: *http://goo.gl/9UjpHx*), or C-174/15. Vereniging Openbare Bibliotheken v. Vereniging Nederlands Uitgeversverbond (available at: *https://goo.gl/mGg1is*).

65 C-201/13. Johan Deckmyn v. Vandersteen. Available at: *https://curia.europa.eu/juris/document/document.jsf?docid=157281&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=42308059*.

66 Josef Drexl: European and International Intellectual Property Law between Propertization and Regulation: How a Fundamental-Rights Approach Can Mitigate the Tension. The University of the Pacific Law Review, Vol. 47, 2016. p. 211.

67 Catherine Seville: The Space Needed for Parody within Copyright Law – Reflections Following Deckmyn. National Law School of India Review, Vol. 27, 2015. p. 9.



1. Willebord Vandersteen's original comic (left) and J. Deckmyn's calendar (right) (source: europeanlawblog.eu)

According to the heirs of the original author (as copyright holders), the graphic artist working on the cover and the publisher,[68] the use of Mr Deckmyn infringed their exclusive rights and thus they brought a civil action before the Brussels Court of First Instance (*Rechtbank van Eerste Aanleg te Brussel*). The court of first instance declared the use described above to be a copyright infringement, despite the existence of a parody exception in Belgian national copyright law and ordered the defendant to cease the infringement. The defendant appealed against the decision and the Court of Appeal in Brussels (*Hof van Beroep te Brussel*) referred the following questions to the CJEU.[69]

68 Mezei Péter: Paródia az Európai Bíróságon. Szerzői jog a XXI. században, blog post, 23 June 2014. Available at: *https://goo.gl/2U762f*.

69 Jonathan Griffiths: Fair dealing after Deckmyn - The United Kingdom's Defence for Caricature, Parody or Pastiche. In: Sam Ricketson – Megan Richardson (ed.): Research Handbook on Intellectual Property in Media and Entertainment, Edward Elgar, 2017. p. 5. Available at: *http://goo.gl/XcddE7*.

„*1. Is the concept of "parody" an autonomous concept of EU law?*
2. If so, must a parody satisfy the following conditions or conform to the following characteristics:
- *display an original character of its own (originality);*
- *display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work;*
- *seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else;*
- *mention the source of the parodied work?*

3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?"

Article 22(1)6° of the 1994 Belgian Copyright Act[70] (which is no longer in force) stated that the author may not object to a parody, caricature or imitation of his work if it was made in accordance with the requirement of fair dealing. In his opinion, Advocate General Pedro Cruz Villalón emphasizes that the referring court's questions do not deal with the interpretation of fair dealing or with the role of the moral rights and the three-step test in assessing the case, in the absence of authorization.[71] The CJEU has also followed this path, although this has not prevented it from making (at least indirectly) relevant findings in the judgment on moral rights.

Accordingly, the CJEU answered the above-mentioned questions primarily in the light of the provisions of the InfoSoc Directive. As explained above, Art. 5(3)(k) of the Directive allows for the exception of reproduction and communication to the public for use in caricature, parody or pastiche.[72]

On the first question, the CJEU, in line with Advocate General Villalón's opinion, explains that parody is not defined in the InfoSoc Directive and that the Directive does not refer back to national law, so "*its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union*"[73] and "*must be regarded as an autonomous concept of EU law*", having regard to the objectives and principles set out in recital (32) of the InfoSoc Directive,[74] such as ensuring a functioning single market and the

[70] De wet van 30 juni 1994 betreffende het auteursrecht. Available at: *http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1994063035&table_name=wet*.

[71] Pedro Cruz Villalón Advocate General's opinion in a C-201/13. 22 May 2014. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CC0201&from=HU*.

[72] Georgios I. Zekos: Copyrights and Trademarks in Cyberspace: A Legal and Economic Analysis. Chicago-Kent Journal of Intellectual Property, Vol. 15, No. 1, 2016. p. 341.

[73] Mezei Péter: Vicces kedvében van az Európai Unió Bírósága. Szerzői jog a XXI. században, blog post, 10 September 2014. Available at: *https://goo.gl/EuEpxE*.

[74] Sinisa Rodin: Constitutional Relevance of Foreign Court Decisions. The American Journal of Comparative Law, Vol. 64, No. 4, 2016. p. 838.

coherent application of exceptions and limitations.[75] The obligation to interpret exceptions uniformly has been confirmed by a number of previous judgments of the CJEU, such as in *ACI Adam*,[76] *Padawan*[77] and *DR & TV2 Danmark*.[78]

The CJEU answered the second and third questions together. According to the CJEU's answer, the exact definition of parody is not regulated in the InfoSoc Directive, so – following the CJEU's case law – it should be interpreted as the word's usual meaning in common language.[79] The national legislator does not get a more specific definition to parody. Advocate General Villalón cites in paragraph 42 of his opinion the argument of the Kingdom of Belgian that the distinction between parody, imitation and caricature is indifferent to the assessment of the case, since "*the three concepts are too similar for it to be possible to distinguish between them*" and the exception of the InfoSoc Directive covers all three concepts anyway.

Furthermore, in interpreting parody as an autonomous concept of EU law, the CJEU – rejecting the criteria raised in the second question – states that the definition of parody does not depend on characteristics or conditions such as originality (original character), relating to the original work itself or mentioning the source of the parodied work.[80] However, two specific conditions are highlighted in paragraph 33 of the decision, with which parody must comply in EU law. Accordingly, a parody must a) *evoke an existing work while being noticeably different from it*, and b) *expresses humour or mockery*.[81]

Thus, according to the CJEU, a parody's purposes are covered by the exception if *1. it does not infringe national law (there is an exception for parody in the Member State),*[82] *2. it meets the conditions for parody as autonomous concept of EU law (evokes an existing work*

[75] Richard Arnold – Eleonora Rosati: Are national courts the addressees of the InfoSoc three-step test? Journal of Intellectual Property Law & Practice, Vol. 10, Iss. 10, 2015. p. 747. Available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627014*.

[76] C-435/12. ACI Adam paragraphs [30]–[31]. Available at: *https://curia.europa.eu/juris/document/document.jsf?text=&docid=150786&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13560040*.

[77] C-467/08. Padawan v. SGAE. See paragraphs [32]–[33] and [37]. Available at: *http://curia.europa.eu/juris/liste.jsf?language=hu&num=C-467/08*.

[78] C-510/10. DR & TV2 Danmark v. NCB. See paragraphs [33]–[37]. Available at: *http://curia.europa.eu/juris/liste.jsf?num=C-510/10&language=EN*.

[79] Faludi (2015) 112.

[80] Deckmyn paragraph [21]. The "relation to the original work" condition refers to the common law terminology, which differentiates between weapon parodies or target parodies. See e.g. Anna Spies: Revering Irreverence – A Fair Dealing Exception for Both Weapon and Target Parodies. UNSW Law Journal, Vol. 34, Iss. 3, 2011. p. 1123.

[81] Zekos (2016) 341.

[82] Emphasizing that in addition to the exceptions set out in the InfoSoc Directive, Member States do not have the authorization to introduce new exceptions or limitations by themselves. See Bernd Justin Jütte: The EU's Trouble with Mashups – From Disabling to Enabling a Digital Art Form. Journal of Intellectual Property, Information Technology & E-Commerce Law, Vol. 5, Iss. 3, 2014. p. 180.

and expresses humour or mockery), 3. it strikes an appropriate balance of interests between stakeholders and is non-discriminatory.[83]

The CJEU adds that parody must also meet the requirement of "fair balance", as stated in recital (31) of the InfoSoc Directive. In the present case, that balance must be struck between the rights and legitimate interests of rightholders guaranteed particularly by Art. 2 and 3 of the InfoSoc Directive and the freedom of expression. In the wording of the CJEU, "*It is not disputed that parody is an appropriate way to express an opinion*" and that "*the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).*" [84] Thus, the CJEU expects that in the event of a collision between exclusive rights and freedom of expression, free use should seek to strike a balance between these interests.[85] This is not a new idea in the practice of the CJEU, in many other cases the CJEU also highlighted that exceptions are rooted in fundamental rights and the importance of achieving a balance between rights.[86] But how could and should this balance be achieved? In Rosati's view, striking an appropriate balance is a duty of the court, taking into account the particular circumstances of the case,[87] but in our view the authorization and instruments necessary to this must be provided by the national legislator. Furthering the CJEU's finding, Geiger indicates that a copyright framework which fails to recognize parody as free use may even constitute an infringement of freedom of expression.[88] In addition, he draws attention to an important aspect: in his view, the possibility of collision with fundamental rights – as externalities from copyright law's point of view – is the most important way of recognizing creative, transformative uses in continental legal systems,[89] so this collision has significant added value.

However, there is clearly a boundary to the limitation of copyright, and the CJEU is trying to reflect on this when it states that the use must not be discriminative.[90] Although the

83 Griffiths (2017) 5.

84 Deckmyn paragraphs [25], [27] and [34].

85 Elena Izyumenko: The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective. Journal of World Intellectual Property, Vol. 19, No. 3-4, 2016. p. 118.

86 See C-70/10. Scarlet v. SABAM paragraph [46] (available at: *http://curia.europa.eu/juris/liste.jsf?language=hu&num=C-70/10*), a C-360/10. SABAM v. Netlog paragraph [44] (available at: *http://curia.europa.eu/juris/liste.jsf?num=C-360/10&language=HU*), C-314/12. UPC Telekabel v. Constantin Film paragraph [46] (available at: *http://curia.europa.eu/juris/liste.jsf?num=C-314/12*), C-145/10. Painer paragraphs [134]–[135], a C-469/17. Funke Medien paragraph [67], a C-476/17. Pelham paragraphs [32], [34] and C-516/17. Spiegel Online paragraphs [42], [51], [58] and [82].

87 Eleonora Rosati: Just a Laughing Matter? Why the Decision in Deckmyn is broader than parody. Common Market Law Review, Vol. 52, 2015. pp. 515–518.

88 Christophe Geiger: Freedom of Artistic Creativity and Copyright Law: A Compatible Combination. UC Irvine Law Review, Vol. 8, No. 3, 2018. p. 428.

89 Ibid. 418.

90 Rosati (2019) 132. and Abbe Brown – Smita Kheria – Jane Cornwell – Marta Iljadica: Contemporary Intellectual Property – Law and Policy. Oxford University Press, 2019. p. 187.

CJEU leaves open the question of what may be a further restriction on the application of an exception (or particularly the parody exception). In our view, if it comes to uses of parody, the answer to this question lies in the area of moral rights (in particular, the right of integrity) and freedom of expression.[91]

The CJEU's decision in the Deckmyn case was followed by both supportive and critical voices. In their published opinion, members of the European Copyright Society expressed the view that full harmonization of exceptions and limitations is necessary and welcomed the CJEU's purposeful and non-restrictive interpretation in its decision, and emphasized that the three-step test required an alternative, more permissive interpretation.[92] In a number of previous cases, for example the *Premier League*[93] and *Ulmer decisions*,[94] the CJEU reached a broader, more flexible interpretation of exceptions. Faludi emphasizes however that when judging parody from a copyright perspective, the extent to which the original work has been used is an important aspect, as the parody must take enough of the original work to recall it, but only draw as much from the original work as is absolutely necessary to evoke it.[95] According to Mezei, the definition of parody should not be approached by emphasizing the EU interpretation; EU law's lack of definition should be seen as leaving the task of defining parody to the Member States.[96] Given that the conditions for copyright protection are not harmonized, the CJEU did not name originality of the adapting work (parody) as a separate condition, which is of course obvious from the internal logic of the Hungarian copyright system.

II.3.2. The Effects of the Deckmyn decision on National Legal Approaches

After the decision in Deckmyn, we had to wait three years to see its impact on Member States' legal approach through a national judgment.

1. *Germany*. The judgment of the German Federal Supreme Court (*Bundesgerichtshof*, BGH) of 28 July 2016 in the *Fett getrimmt case*[97] deals with the conditions laid down by the

[91] Sabine Jacques – Krzysztof Garstka – Morten Hviid – John Street: An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity. SCRIPTed: A Journal of Law, Technology and Society, Vol. 15, No. 2, 2018. p. 290. and Koltay András: A gyűlöletbeszéd korlátozásának elméleti szempontjai. Iustum Aequum Salutare, 2011/3. Available at: *http://ias.jak.ppke.hu/hir/ias/20113sz/13.pdf*.

[92] European Copyright Society: Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn. 2014. pp. 2-4. Available at: *https://goo.gl/BH79v6*.

[93] C-403/08. and C-429/08. Football Association Premier League Ltd v. QC Leisure. Available at: *https://goo.gl/8cTzAT*.

[94] C-117/13. Technische Universität Darmstadt v. Eugen Ulmer KG. Available at: *https://goo.gl/LyyNhA*.

[95] Faludi (2015) 97, 115.

[96] Mezei Péter: Paródia az Európai Bíróságon. In: Homoki-Nagy Mária – Hajdú József (ed.): Ünnepi kötet Dr. Czúcz Ottó egyetemi tanár 70. születésnapjára. Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Szeged, 2016. pp. 469–475.

[97] BGH, I ZR 9/15, 2016. Available at: *https://goo.gl/grl4wI*.

CJEU in relation to uses of parody and the applicability of these conditions in the law of Member States. According to the facts of the case, a competition called "Promis auf fett getrimmt" was announced by the online portal BZ News.[98] The applicants were expected to create and upload original photographs featuring celebrities, which have been digitally altered so as to make the subjects look fat. One of the works, in which the actress Bettina Zimmermann is portrayed, was the subject of litigation[99] by the author of the original work, claiming that the use of the work without permission and without payment infringed copyright.

2. The original photograph (left) and the digitally altered version (right) (source: ipkitten.blogspot.com)

In the light of the Deckmyn decision, it was particularly significant and interesting whether the BGH would stick to its earlier interpretation of the German general free use exception (*freie Benutzung*) in relation to parody or would take over the conditions developed by the CJEU.

In its decision, the BGH stated that,[100] although the exception covers a wide variety of uses and was considered by German jurisprudence to be an internal limitation of copyright rather than a simple exception to exclusive rights, Art. 24 of the German Copyright Act,[101]

[98] Jan Bernd Nordemann – Viktoria Kraetzig: The German Bundesgerichtshof changes its concept of parody following CJEU Deckmyn v. Vrijheidsfonds/ Vandersteen. Kluwer Copyright Blog, 3 November 2016. Available at: *https://tinyurl.com/yasnut5x*.

[99] Eleonora Rosati: Parody and free use in Germany: Federal Court of Justice decides first parody case after Deckmyn. The IPKat, blog post, 6 September 2016. Available at: *https://goo.gl/iKHkZD*.

[100] Ujhelyi Dávid: Paródiával kapcsolatos döntés született Németországban. Szerzői jog a XXI. században, blog post, 7 September 2016. Available at: *https://goo.gl/xzf4Mm*.

[101] Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273) (UrhG).

which contains a general case of free use, should be treated as a parody exception[102] and thus EU law should be applied. Accordingly, the BGH rejected its previous practice and interpreted the German parody exception along the lines[103] set out in the Deckmyn case.[104] In its assessment of the specific case, the BGH also omitted the conditions stating that the use should be oriented towards the original work and it should distort the message of the original work, which were included in its previous practice.[105]

The BGH even referred to the requirement to balance the legitimate interests of the author and the user. On the one hand, it is in the author's interest that the parody was created by distorting the original work – moral rights must be kept in mind here. Furthermore, the author has a legitimate interest in not being associated with a possible violation of a personal right, including the rights of the actress in the photograph. It is also relevant that the parody did not criticize the original work directly. At the same time, the right of the parodist to express an opinion[106] must also be kept in mind and copyright must not be the rightholders' instrument of censorship based on political correctness.[107]

In its decision, the BGH did not take a position on the question of the lawfulness of the use, but ordered new proceedings before the court which had previously ruled on the use based on the old parody case-law. Even if no conclusion was reached at the end of the case, the BGH found that the interpretation[108] of the parody exception developed in the Deckmyn case should be applied in the national law of Member States,[109] even if it differs significantly from previous case-law.[110]

[102] See also Bruce Rich – Benjamin E. Marks (ed.): The Media and Entertainment Law Review. Law Business Research Ltd, 2019. p. 57.
[103] Andreea Seucan: The concept of parody. Juridical Tribune, Vol. 5, Iss. 1, 2015. p. 103.
[104] Henrike Maier: Remixe auf Hostingplattformen – Eine urheberrechtliche Untersuchung filmischer Remixe zwischen grundrechtsrelevanten Schranken und Inhaltefiltern. Mohr Siebeck GmbH, 2018. p. 47.
[105] Daniël Jongsma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back? IPRinfo, 2019/1. p. 4. Available at: *https://iprinfo.fi/wp-content/uploads/sites/2/2019/02/FINAL_Jongsma_IPRinfo_1_2019.pdf*.
[106] See also Andromachi Kampantai: Trademark Parody: Limit to the Concept of Dilution or Inherent Right of the Public? UK Law Students Review, Vol. 3, Iss. 1, 2015. p. 52.
[107] See BGH's decision paragraph 37. p. 18.
[108] European Copyright Society: Limitations and exceptions as key elements of the legal framework for copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn. 2014. pp. 2-3. Available at: *https://goo.gl/ZjjmEb*.
[109] Henrike Maier: German Federal Court of Justice rules on parody and free use. Journal of Intellectual Property Law & Practice, Vol. 12, Iss. 1, 2017. p. 17.
[110] Cf. Frédéric Döhl: Zum drohenden Pastiche-Begriff im Kontext der freien Benutzung nach § 24 Abs. 1 UrhG. UFITA – Archiv für Medienrecht und Medienwissenschaft. 2019/1. p. 26. Available at: *https://tinyurl.com/yakyf546*.

2. *France*. The question of the application of the parody exception was also raised before the French courts in *Bauret v Koons*.[111] In 1970, Jean-François Bauret created a photographic work (*Enfants*), in which two young children, a boy and a girl stand side by side embracing each other and holding each other's hands. From 1975, the photograph could also be purchased in the form of a postcard. Jeff Koons, an artist from the United States, made four identical sculptures as part of a series of '*banality*' based on the photograph in 1988, which were uniformly named *naked*. The sculptures differ only minimally from Bauret's original photograph: the children embrace each other, the little boy hands a flower to the little girl with his free hand, and the sculptures stand on a colourful pedestal covered with flowers.[112]

3. Bauret's photograph (left) and one of the sculptures made by Koons (right) (source: baylos.com)

In 2014, Bauret's widow (and his copyright successor) became aware of the existence of the sculptures Koons wanted to exhibit at the Pompidou Centre of Paris. In the end, the sculptures were not exhibited, but the works were featured on the flyers for the exhibition.[113]

[111] Decision of first instance: Bauret v. Koons. Tribunal de Grande Instance de Paris, No. 15-01086, 9 March 2017. Decision of second instance: Bauret v. Koons. Cour d'Appel de Paris, No. 17/09695, 17 December 2019. Available at: *https://drive.google.com/file/d/1Qqb2NXAIaZLzoSd7vbScX050dQntyB95/view*.

[112] Mark Edward Blankenship: Prince & the Revolution of Transformative Use: Observing "New Portraits" Alongside the Potential Specter of Appropriation Art's Past. Kentucky Law Journal, Vol. 107, 2018. p. 2. Available at: *https://tinyurl.com/yax8ultr*.

[113] Eleonora Rosati: Paris Court of Appeal confirms that Koons's 'Naked' sculpture infringes copyright in 'Enfants' photograph, rejecting freedom of the arts and parody defences. IPKat Blog, 23 December 2019. Available at: *http://ipkitten.blogspot.com/2019/12/paris-court-of-appeal-confirms-that.html.*

Koons argued in the lawsuits that while the sculptures were indeed based on Bauret's photograph, there are significant differences between the two works: the photograph symbolizes childhood innocence, while the sculptures refer back to the story of Adam and Eve, but there are a number of other visible differences, such as the dimensions of the works, the use of colours or even the composition. This argument was not upheld before the courts, but in the light of the CJEU's practice,[114] the conflict between exclusive rights and artistic freedom – arising from[115] freedom of expression –[116] was a serious consideration in the decision-making process. In addition, Koons argued during the proceedings that his work could even be considered as parody. The French courts relied on the conditions laid down in the Deckmyn judgment, disregarding their previous case law. The courts examined whether the use evoked the original work or expressed humour or mockery.[117]

In the end, both courts came to the same conclusion: Koons' use did not meet the conditions required for the parody free use, so it must be considered infringing Bauret's rights.[118]

3. *Canada*. The significance of the Deckmyn decision is shown by the fact that its findings are relevant not only for the practice of the Member States but also outside of Europe, since they have been adopted in Canada (in a country that is to some extent under the influence of United States case law). The *United Airlines v. The Jeremy Cooperstock* case[119] – in an unusual way – started from a consumer protection problem: Jeremy Cooperstock had a negative experience with United Airlines in 1997, and in response set up the website "Untied.com" in 1998. The website initially collected information, criticisms and complaints only about United Airlines and later about other airlines and their employees. From 2011, Mr. Cooperstock began to align the look of the website with United's official website, and in 2012, the similarity between the two websites was already misleading. Following a series of letters of formal notice, United Airlines filed a civil lawsuit against Mr. Cooperstock in 2015.[120]

[114] C-516/17. Spiegel Online, C-469/17. Funke Medien and C-476/17. Pelham decisions were taken into account by the courts.

[115] Sabine Jacques: The Parody Exception in Copyright Law. Oxford University Press, 2019. p. 154.

[116] See also Szabó Sarolta: Alapvető jogok védelme és az Európai Unió nemzetközi magánjoga. Iustum Aequum Salutare, 2014/2. Available at: *http://ias.jak.ppke.hu/hir/ias/20142sz/06.pdf*.

[117] Christophe Geiger: "Fair Use" through Fundamental Rights in Europe, When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations. Center for International Intellectual Property Studies Research Paper Series, No. 2018-09, 2018. p. 24. Available at: *https://ssrn.com/abstract=3256899*.

[118] Giancarlo Frosio: Reconciling Copyright with Cumulative Creativity: The Third Paradigm. Edward Elgar Publishing, 2018. Chapter III, footnote 969. and Rosati (2019).

[119] United Airlines v. Jeremy Cooperstock (2017 FC 616). Available at: *https://ccla.org/cclanewsite/wp-content/uploads/2018/07/UA-v-Cooperstock-CCLA-Memo-of-Fact-Law-FINAL-July-3-2018.pdf*.

[120] Cynthia Rowden – Tamara Céline Winegust: Untied Tied Up… United Airlines Takes Aim at Complaint Website (Part I). Bereskin & Parr, September 1, 2017. Available at: *https://www.bereskinparr.com/doc/untied-tied-up-united-airlines-takes-aim-at-complaint-website-part-i*

4. The trademark of United Airlines (above) and the logo used by Untied.com (below) (source: ipkitten.blogspot.com)

The case was of particular interest because it was the first test of the Canadian parody exception (that came into effect in 2012). In the course of the proceedings, Cooperstock claimed, inter alia, that its use fell within the scope of fair dealing, which included uses for parody purposes, so it did not constitute an infringement. The Supreme Court of Quebec (SCQ), similarly to the CJEU, has indicated that as freedom of expression and exclusive rights may be in conflict in this particular case,[121] it is also necessary to strike a balance between the legitimate interests of rightholders and users.[122] In the context of parody (which is unusual in an Anglo-Saxon legal systems),[123] the SCQ indicated that the approach set out in the CJEU's Deckmyn decision is also in line with the intention of the Canadian legislator,[124] thus it is only necessary to examine whether the use evoked the original work and expressed humour or mockery. In the end, the SCQ ruled that,[125] since the use was primarily for the purpose of defamation rather than laughter, Cooperstock's conduct did not meet the requirements of fair dealing[126] and constituted an infringement.[127]

[121] Florian Martin-Bariteau: The Idea of Property in Intellectual Property. U.B.C. Law Review, Vol. 52, No. 3, 2019. p. 896.
[122] Carys J. Craig: Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks. American University International Law Review, Vol. 33, No. 1, 2017. p. 52.
[123] Sabine Jacques: First application of the Canadian parody exception. Journal of Intellectual Property Law & Practice, Vol. 12, No. 11, 2017. p. 896.
[124] Amy Lai: The Natural Right to Parody: Assessing the (Potential) Parody/Satire Dichotomies in American and Canadian Copyright Laws. Windsor Yearbook of Access to Justice, Vol. 35, No. 1, 2018. p. 94.
[125] About the decision of first instance, see: Ujhelyi Dávid: A Kanadai Szövetségi Bíróság átvette a Deckmyn-döntés paródia fogalmát. Copy21 Blog, blog post, 7 July 2017. Available at: *http://copy21.com/2017/07/dontesfigyelo-1-5-a-kanadai-szovetsegi-birosag-atvette-a-deckmyn-dontes-parodia-fogalmat/*.
[126] The case raised questions regarding trademark law as well, SCQ found the use of the mark also infringing.
[127] United Airlines v. Jeremy Cooperstock (2017) 3.

II.4. A Partial Conclusion

As we have seen, despite the relatively late and fragmented start of copyright law's harmonization in the EU,[128] the emphasis in recent years has been on comprehensive and balanced legislation, not only to clarify the content of economic rights but also to update exceptions in response to the digital advancements.

The parody exception appeared in the InfoSoc Directive as an optional form of free use in 2001 and – following the 2013 Deckmyn decision – in 2019 it has become a mandatory exception to the communication to the public right under Art. 17(7) of the CDSM Directive.

The judgment in Deckmyn is of paramount importance among the decisions of the CJEU: the CJEU has been relatively flexible in its interpretation of parody,[129] leaving a very wide range of uses that can be covered by the exception. In our view, this was the right approach, which is in line with the international practice of uses of parody and a number of studies.

It should be emphasized that both the CJEU and the which apply the criteria laid down in its decision have paid close attention to the role of parody in protecting freedom of expression and ensuring a proper balance[130] between conflicting rights.

According to the CJEU's case law, EU law takes precedence[131] over national law in the interpretation of exceptions and limitations that are mandatory in EU law in order to ensure their uniform application in the internal market, so it is – in principle – not possible for Member States to interpret these provisions differently. It seems clear from the examples of Germany and France that – in the context of copyright exceptions and limitations – the primacy of EU law has been respected by Member States in interpreting existing exceptions, consequently they applied the conditions set by the CJEU, even if they were contrary to their own past practice.

As a result of the above, the Hungarian legislator found itself in a very unique situation: on the one hand, the Deckmyn decision and the subsequent practice in the other Member States provided it with clear guidance as to the scope and conditions of the exception. On the other hand, by making the application of the exception mandatory, even if only in the context of the communication to the public right, the CDSM Directive also deprived the national legislator of the possibility of considering the necessity of the exception's transposition. The Union legislator has only left it to the Member States to decide whether they want to transpose an exception covering only the communication to the public right, or in its entirety (as provided by the InfoSoc Directive).

[128] Tattay Levente: Versenyképesség és szellemi alkotások az Európai Unióban. Wolters Kluwer, Budapest, 2017. Chapter 4.5.

[129] Raquel Xalabarder: The Role of the CJEU in Harmonizing EU Copyright Law. International Review of Intellectual Property and Competition Law, Vol. 47, 2016. p. 638.

[130] See also: Pogácsás Anett: Érték és szabadság. Iustum Aequum Salutare, 2016/1. p. 73. Available at: *http://ias.jak.ppke.hu/hir/ias/20161sz/07.pdf*.

[131] See C-510/10. DR & TV2 Danmark v. NCB paragraph [36].

In our view, given that a narrower exception would be substantially inappropriate for the recognition of parody and for finding a fair balance between copyright and freedom of expression,[132] it is only possible to transpose the exception into the Hungarian copyright regime based on the fullest authorization of the InfoSoc Directive.

III. MORAL RIGHTS AND PARODY

Moral rights cannot be considered new in either international or domestic copyright law (related provisions appeared in the Berne Convention[133] in 1928).[134] The roots of moral rights reach all the way back to the Renaissance,[135] and they can be found in the regulations of more than 160 countries.[136] So, it can be said with confidence – formally at least – that we are talking about a widely recognised legal construct.

At the same time, as many papers have noted,[137] the development of moral rights has been uneven, their regulation is fragmented, patchwork-like, and the range of rights granted and the extent of protection may vary from country to country. It can also be stated that the moral rights could be traced back to 17th and 18th century thinkers like Locke,[138] Kant or Hegel,[139] they were based on the dogmatic and idealised connection between the author and his work. Moral rights have essentially continental roots – Anglo-Saxon literature often notes that they are the result of the romantic of the author in the continental conception[140] and due to their different background and rationale, moral rights' recognition and protection in Anglo-Saxon countries is a highly controversial topic.

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[132] Jacques – Garstka – Hviid – Street (2018) 283–284.

[133] Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). Available at: *https://wipolex.wipo.int/en/text/283698*.

[134] Thierry Joffrain: Deriving a (Moral) Right for Creators. Texas International Law Journal, Vol. 36, 2001. p. 751.

[135] Part Krisztina Katalin: A szerzői jogi szabályozás kialakulása Angliában, Németországban és az Egyesült Államokban. Industrial Property and Copyright Review, 2006/4. p. 149. Available at: *https://www.sztnh.gov.hu/sites/default/files/kiadv/ipsz/200608-pdf/06_08_SZEMLE.pdf*.

[136] Peter K. Yu: Moral Rights 2.0. Texas A&M Law Review, Vol. 1, No. 4, 2014. p. 875.

[137] Molly Torsen: Authorial Rights and Artistic Works: An Analysis of the International Calibration. eLaw Journal, Vol. 15, No. 2, 2008. p. 245. and Jacqueline D. Lipton: Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas. Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. 21, No. 3, 2011. p. 548. and Pogácsás Anett: A digitális mű integritásvédelmének aktuális kérdései. In: Grad-Gyenge Anikó – Kabai Eszter – Menyhárd Attila (ed.): Liber Amicorum – Studia G. Faludi Dedicata: Ünnepi tanulmányok Faludi Gábor 65. születésnapja tiszteletére. ELTE Eötvös Kiadó, Budapest, 2018. p. 320.

[138] Lai (2018) 70.

[139] Robert C. Bird – Lucille M. Ponte: Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations. Boston University International Law Journal, Vol. 24, No. 2, 2006. p. 218.

[140] Dane S. Ciolino: Rethinking the Compatibility of Moral Rights and Fair Use. Washington and Lee Law Review, Vol. 54, No. 1, 1997. p. 38, 76. See also: Ujhelyi (2014) 46.

In the light of all this, it does not seem surprising that papers focusing on the copyright assessment of parody typically address the issue of moral rights only to a very limited extent, even though it is an essential issue for the full assessment and proper functioning of the exception.

Two moral rights seem to be specifically relevant to parody uses, but with different intensities. On the one hand, the recognition of authorship (or the right to claim authorship): the question arises as to whether it is necessary to indicate the author of the original work on an adaptation? Moreover, is it necessarily in the author's best interests that his name should always appear on the parody or on the contrary? While these questions are relevant, studies only sporadically discuss the issue of the right to claim authorship, the emphasis is often shifted to the right of integrity, the second moral right that is relevant in parody cases. There is no doubt that there is a very close connection between adaptation and the right of integrity,[141] and this will inevitably have an impact on the parody as well. Studies of the Anglo-Saxon legal system typically take a firm standpoint on this issue, according to which there is a serious and hardly reconcilable contradiction[142] between the integrity of the work[143] and the uses of parody.

The purpose of this Chapter is to examine the extent to which parody uses are compatible with moral rights (especially the right to claim authorship and the right of integrity) by examining relevant international regulations and certain national solutions and domestic provisions.

III.1. Moral Rights in International Law

Moral rights became part of the international copyright framework by way of the amendment of the Berne Convention by the 1928 Rome Protocol, and the regulations were updated in 1948 through the Brussels Protocol.[144] Article 6*bis* of the Berne Convention names two moral rights, on the one hand the right to claim authorship of the work, from which in some countries – including Hungary – the author's right to indicate his name on the work is derived, and on the other hand the right to integrity ("*to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation*"). The Berne Convention also states that moral rights are independent of the author's economic rights and their transfer. Protection

[141] Faludi Gábor: Az új Ptk. hatása a szerzői jogi és iparjogvédelmi jogátruházási szerződésekre. In: Pogácsás Anett (ed.): Quærendo et creando. Ünnepi kötet Tattay Levente 70. születésnapja tiszteletére. Szent István Társulat, Budapest, 2014. p. 175. and Faludi Gábor: Szerzői jog, iparvédelem és a Ptk. koncepciója – II. rész. Polgári Jogi Kodifikáció, Vol. 5, Iss. 3, 2003. p. 4. Available at: *https://ptk2013.hu/wp-content/uploads/2012/11/2003-3kodi.pdf*.

[142] Joffrain (2001) 760.

[143] See also: Jessica Litman: Digital Copyright. Prometheus Books, 2006. p. 184.

[144] Bird – Ponte (2006) 224.

should be maintained until the end of protection of economic rights, although the Berne Convention allows for a limited period for member states to limit the protection of moral rights until the author's death.

There seems to be a consensus in the legal literature that Article 6*bis* of the Berne Convention was intended to achieve a common ground[145] between the contracting parties, but therefore leaves a wide margin of discretion for the national legislator: regulations can be adapted to the national needs of the member states[146] especially for the scope and limitation of moral rights and the possibility of waiving moral rights, [147] but as a result, the picture of moral rights became very colourful at European level.[148]

Due to the commercial focus of the TRIPS Agreement[149] and the successful lobbying of the United States (which sought to rule out the possibility of raising the issue of compliance with Article 6*bis* of the Berne Convention before the WTO Dispute Settlement Body),[150] the agreement does not address moral rights.[151] Moreover, although Article 9(1) of the TRIPS Agreement states that its Members must comply with Art. 1 through 21 of the Berne Convention, this obligation does not apply to Art. 6*bis*.[152]

Among the WIPO Internet Treaties, the WIPO Copyright Treaty (hereinafter WCT)[153] has a similar approach to the TRIPS Agreement, and it does not deal with personal rights, but Art. 5 of the WIPO Performances and Phonograms Treaty (hereinafter WPPT)[154] gives performers the right to claim authorship and the right to integrity in their live performances and phonograms. By almost verbatim adapting the provision of the Berne Convention, the

[145] Peter Jones: Copyright Law and Moral Rights. Waikato Law Review, Vol. 5, 1997. pp. 86–87.
[146] Torsen (2008) 238.
[147] Roberta Rosenthal Kwall: Copyright and the Moral Right: Is an American Marriage Possible. Vanderbilt Law Review, Vol. 38, Iss. 1, 1985. p. 14.
[148] It is also worth mentioning that the Berne Convention also contains provisions on moral rights with regard to certain free uses, see e.g. Art. 10(3) of the Berne Convention. "Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon."
[149] Agreement on Trade-Related Aspects of Intellectual Property Rights, 1998. Available at: *https://wipolex.wipo.int/en/text/305907*.
[150] Yu (2014) 876.
[151] Faludi Gábor: Szerzői jog, iparvédelem és a Ptk. koncepciója – I. rész. Polgári Jogi Kodifikáció, Vol. 5, Iss. 2, 2003. p. 10. Available at: *https://ptk2013.hu/wp-content/uploads/2012/11/2003-2kodi.pdf*.
[152] TRIPS Agreement Art. 9.1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6 *bis* of that Convention or of the rights derived therefrom.
[153] WCT, 1996. Available at: *https://wipolex.wipo.int/en/text/295166*.
[154] WPPT, 1996. Available at: *https://wipolex.wipo.int/en/text/295578*.

Beijing Treaty[155] (also managed by WIPO, entered into force on 28 April 2020)[156] extends the moral rights of performers guaranteed by the WPPT to their audiovisual performances. The wording of the Beijing Treaty – signed in 2012 and signed by Hungary in the same year –, follows the established format of the Berne Convention and WPPT, but the right to integrity in Art. 5(1)(ii) is supplemented by the condition that the nature of audiovisual recordings must be taken into account.

III.2. Moral Rights (or the lack thereof?) in EU Law

The EU has a limited mandate to harmonize intellectual property rights, linked to the establishment and functioning of the internal market.[157] With regard to the interpretation of the scope of the limited competence[158] contained in Art. 118 of the TFEU, the legal literature typically argues that the provision does not, or only to a very limited extent,[159] allow the EU to legislate on moral rights.[160]

Nor does Art. 17 of the EU Charter of Fundamental Rights[161] provide guidance on the interpretation of the EU's legislative competence in relation to moral rights, but there is no doubt that some EU bodies have examined the issue and possibilities of harmonizing mor-

[155] Beijing Treaty on Audiovisual Performances, 2012. Available at: *https://wipolex.wipo.int/en/text/295837*. See also: Tattay Levente: A szellemi alkotások területén bekövetkezett jogfejlődés dimenziói Magyarországon (1990–2016). In: Darák Péter – Koltay András (ed.): Ad astra per aspera. Ünnepi kötet Solt Pál 80. születésnapja alkalmából. Pázmány Press, Budapest, 2017b. p. 640. Available at: *https://jak.ppke.hu/uploads/collection/207/file/SoltPal_kotet_2017.pdf*

[156] Békés Gergely: Breaking News: Hatályba lép a Pekingi Szerződés. Szerzői jog a XXI. században, blog post, 30 January 2020. Available at: *http://copy21.com/2020/01/breaking-news-hatalyba-lep-a-pekingi-szerzodes/*. See also: WIPO: WIPO's Beijing Treaty on Audiovisual Performances Set to Enter into Force with Indonesia's Ratification; Aims to Improve Livelihoods of Actors and other Audiovisual Performers. WIPO.int, press release, PR/2020/845, January 28, 2020. Available at: *https://www.wipo.int/pressroom/en/articles/2020/article_0002.html?utm_source=WIPO+Newsletters&utm_campaign=0dc2e73642-EMAIL_CAMPAIGN_2020_01_16_10_17&utm_medium=email&utm_term=0_bcb3de19b4-0dc2e73642-254587045*

[157] According to Art. 118. of the Treaty on the Functioning of the European Union (TFEU) "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."

[158] See also: Eleonora Rosati: Originality in EU Copyright: Full Harmonization through Case Law. Edward Elgar, 2013. pp. 231–236.

[159] Marina Perraki: Moral Rights: Could There Be a European Harmonisation - A Comparative Study of the Common Law and Civil Law Approach. Revue hellénique de driot international, Vol. 53, 2000. p. 344.

[160] Albert Fang: Let Digital Technology Lay the Moral Right of Integrity to Rest. Connecticut Journal of Intellectual Property Law, Vol. 26, 2011. p. 475.

[161] Charter of Fundamental Rights of the European Union. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN*.

al rights on several occasions. Such was the case with the European Commission's Green Paper[162] in 1995, which stated that, although the legislation had not yet addressed the issue of individual rights, the need for it could be examined with the arrival of the information society.

Five years later, also at the initiative of the European Commission, a study focusing specifically on the issue of moral rights was carried out,[163] which sought to shed light on the need for harmonization by examining the relevant industries. However, this study concluded that there did not appear to be a need for uniform regulation at EU level, either for individual industries or on the internal market as a whole.[164]

Even in EU secondary sources of law, there is only a rare reference to moral rights. Art. 9 of the former Term of Protection Directive[165] merely states that "*This Directive shall be without prejudice to the provisions of the Member States regulating moral rights.*" Furthermore, recital (19) of the InfoSoc Directive merely states that "*[t]he moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.*" Two recitals of the CDSM Directive also deal with moral rights, in both cases with regard to the new exceptions introduced by the Directive. Recital 23 states, with regard to the cross-border education exception, that "*Member States should, for example, remain free to require that the use of works or other subject matter respect the moral rights of authors and performers.*" In relation to out-of-commerce works, recital 37 states: "*[n]ever-in-commerce works can include posters, leaflets, trench journals or amateur audiovisual works, but also unpublished works or other subject matter, without prejudice to other applicable legal constraints, such as national rules on moral rights.*" It is clear that moral rights appear at most as one of the external limits of EU legislation in the relevant directives, which further strengthens the position on the limitation of EU competences.[166]

The first decision before the CJEU concerning moral rights was taken in the *Independent Television case*.[167] In the judgment, when comparing intellectual property rights (and in

[162] Commission of the European Communities: Copyright and Related Rights in the Information Society. Green Paper, COM(95) 382 final, 1995. pp. 65–68. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51995DC0382&from=EN*

[163] Marjut Salokannel – Alain Strowel – Estelle Derclaye: Study contract concerning moral rights in the context of the exploitation of works through digital technology. ETD/99/B5-3000/E/28, 2000. Available at: *http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60475*.

[164] Ibid. 225.

[165] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights. Available at: *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0116*.

[166] Yu (2014b) 877.

[167] T-76/89. Independent Television Publications Ltd v Commission of the European Communities. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989TJ0076&from=EN*.

particular the reproduction right) and freedom of competition, the CJEU concludes that, if exercised contrary to the purpose of an exclusive copyright, freedom of competition in the internal market should be given priority. The CJEU also notes that Art. 36 of the Treaty establishing the European Community,[168] which exempts, inter alia, "industrial property" from quantitative restrictions, must be interpreted as meaning that it also protects moral rights.[169]

In its decision in the *Phil Collins case*[170] the CJEU states that the regulation of the moral rights is the responsibility of the legislature of the Member States, highlighting the right to integrity as an example in this area. However, the judgment indicates that moral rights, like economic rights, may affect the internal market, which may give rise to EU legislative competence under the founding treaties.[171]

Advocate General Villalón's opinion in the Deckmyn case preceded the narrower interpretation by stating, referring to recital 19 of the InfoSoc Directive, that "*[t]he moral rights of rightholders should be exercised according to the legislation of the Member States.*"[172] In line with this, the judgment itself no longer explicitly mentions the issue of moral rights, but there are points in the CJEU's reasoning that may be relevant in this regard.[173] The CJEU states that "*[t]he concept of «parody», within the meaning of that provision, is not subject to the conditions that the parody should* […] *mention the source of the parodied work.*"[174] Although the mentioning or indication of the source of the parodied work is not necessarily identical to the recognition of authorship or the author's right to have his name indicated – in practice this is often indicated only with a hyperlink – the reference to the original work is traditionally made with a reference to the author and the title of the adapted work. The InfoSoc Directive, in several free uses, interprets the source, including the author's name, is indicated" InfoSoc Art. 5(3)a), c), d) and f),[175] while the CDSM Directive chooses the same solution for free use in connection with cross-border education.[176] Chapter IV of the Hungarian Copyright Act (hereinafter HCA),[177] dealing with free uses, regulates the indication of the source in a number of ways, including, in the case of citation and borrowing, as "*the*

[168] The text in force at the time of the case is available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11992E/TXT&from=EN*.
[169] Ibid. paragraph [56].
[170] C-92/92. and C-326/92. Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul kontra EMI Electrola GmbH. Available at: *http://curia.europa.eu/juris/celex.jsf?celex=61992CJ0092&lang1=hu&type=TXT&ancre=*.
[171] Ibid. paragraphs [19]–[22].
[172] See paragraph 28 of Advocate General Villalón's opinion.
[173] Eugene C. Lim: On the Uneasy Interface between Economic Rights, Moral Rights and Users' Rights in Copyright Law: Can Canada Learn from the UK Experience. SCRIPTed: A Journal of Law, Technology and Society, Vol. 15, No. 1, 2018. p. 88.
[174] Deckmyn case paragraph [36] 2).
[175] See Art. 5(3) points a), c), d) and f) of the InfoSoc Directive.
[176] Art. 5(1) point b) of the CDSM Directive.
[177] Act LXXVI of 1999 on Copyright.

source and the author named therein". In the case of three other free uses, the phrase "*the source and the name of the author must be indicated*" is used,[178] which is in line with the solution used in EU law. Based on all this, it appears that both EU law and the regulatory solutions of the HCA include the author's right to have his name indicated in the obligation of source indication.

Furthermore, as regards the uses which carry a discriminatory message, the *Deckmyn decision* states that "*holders of rights* […] *have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.*"[179] That finding appears to have addressed, on the one hand, the negative aspects of the right to claim authorship of the work and, on the other hand, it indirectly includes requirements relating to the right of integrity.[180] Mezei summarizes the findings of the CJEU and the conclusions that can be drawn from it as follows.

> "*However, the above decision of the CJEU in its own form means that in the case of violations of fundamental rights, integrity is also violated, but without the violation of fundamental rights, moral rights are marginal. This could ultimately lead to a stalemate in the courts of the Member States: because while the CJEU says that «parodying with something» (in the absence of a violation of fundamental rights) is okay, the Member States' practice with regard to moral rights may suffer.*"[181]

Mezei explains in another place, that "*[a]nother somewhat paradoxical conclusion of the Deckmyn judgment is that, while the CJEU has considered it possible to enforce* […] *fundamental rights based on adopting changes relative to the original work (infringement of the right of integrity), such partial recognition of the moral rights* […] *is in the interests of the pictured community (the Muslim minority). If this is true, then the most important innovation of the Deckmyn judgment is the creation of a completely new regime for moral rights.*"[182] Pogácsás expresses similar reservations: "*the violation of the right to integrity alone would not have been sufficient, or we could say that the «political cartoon» in question could be considered infringing copyright only because the parody violates another fundamental right (here, non-discrimination). Although this decision is understandable in view of the European Union's relationship with moral rights, the recognition of integrity as an independent right may be confusing for Member States' practice of balancing interests.*"[183]

[178] HCA Section 34(1)-(2), Section 36(1)-(2) and Section 37.
[179] Deckmyn case paragraphs [29]–[31].
[180] Rosati (2015) 527.
[181] Mezei (2014).
[182] Mezei (2016) 475.
[183] Pogácsás (2018) 335.

In our opinion, the above conclusions of Mezei and Pogácsás are correct. Although the Deckmyn decision formally avoids the issue of moral rights, it nevertheless makes relevant and serious findings with regard to the right to claim authorship of the work, the author's right to have his name indicted and the right of integrity. This is especially true for Hungarian copyright law, as in our case it was not possible to hide behind the conditions of a pre-existing exception or judicial practice and weigh the findings of the CJEU from there: the legislator had to pay attention to the CJEU's findings during the codification of the parody exception.

III.3. Moral rights in France

Moral rights were born in the cradle of continental law,[184] as they originated in France.[185] They stem from natural law thinking, the romantic image of the author, and the inner, immanent, and close relationship between the author and his work.[186] The importance of their codification was also emphasized by Honoré de Balzac and Victor Hugo.[187] As early as the first half of the 20th century, French jurisprudence began to work out the foundations of moral rights. Several judgements have been reached that can be seen as precursors to the rights to publication,[188] to claim authorship and to integrity.[189] Later practice also proved to be very rich,[190] the term "moral rights" itself being first used in a 1902 lawsuit.[191] In the French system, moral rights cannot be alienated, they are upheld after the death of the author,[192] but there is a limited possibility of waiving them.[193] However, moral rights

[184] Mariko A. Foster: Parody's Precarious Place: The Need to Legally Recognize Parody as Japan's Cultural Property. Seton Hall Journal of Sports and Entertainment Law, Vol. 23, No. 2, 2013. p. 243.
[185] Roberta Rosenthal Kwall: The soul of creativity: forging a moral rights law for the United States. Stanford University Press, 2010. p. 39.
[186] Ciolino (1997) 38, 76.
[187] Kwall (2010) 39.
[188] Vauve Vergne c. Héritiers Vergne, Cour d'appel. Paris, 11 January 1828. Available at: *https://tinyurl.com/rlnryay*. See also: Calvin D. Peeler: From the Providence of Kings to Copyrighted Things (and French Moral Rights). Indiana International & Comparative Law Review, Vol. 9, 1999. p. 447.
[189] Marquam c. Lehuby, Tribunal de commerce. Paris, 22 August 1845. Available at: *https://tinyurl.com/ssng4rg*. See also: Lee Marshall: Bootlegging: Romanticism and Copyright in the Music Industry. SAGE Publications, 2005. p. 47.
[190] Isabella Alexander – H. Tomás Gómez-Arostegui: Research Handbook on the History of Copyright Law. Edward Elgar, 2016. p. 419.
[191] Cinquin c. Lecocq, Cour de Cassation. Paris, 25 June 1902. See also: Natalie C. Suhl: Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work? Fordham Intellectual Property, Media and Entertainment Law Journal, Vol. 12, No. 4, 2002. p. 1210.
[192] Perraki (2000) 335.
[193] Thomas P. Heide: The Moral Right of Integrity and the Global Information Infrastructure: Time for a New Approach. U.C. Davis Journal of International Law & Policy, Vol. 2, 1996. pp. 245–247.

can be limited, e.g. with regard to the right to integrity, French law contains a limitation concerning software.[194]

French law has provided for an explicit parody exception[195] since 1957,[196] the provision was revised in 1992, and has remained unchanged since then.[197] The wording of the free use is general in the sense that it is not tied to a specific use or economic right, so in principle any use of a work for parody purposes is allowed as long as it satisfies the regulated conditions (published work, compliance with the rules of the genre).[198] From this, several studies have concluded that parody uses can be exercised regardless of moral rights, possibly overriding both the author's right to have his name indicated and the integrity of the work.[199]

French case law helps to judge the above statement. The 1962 *Buffet case*[200] was based on the sale of a refrigerator door. French painter Bernard Buffet has been invited to take part in an auction. For the event, Buffet painted the four sides (the door, left and right sides and the top) of a refrigerator; his work was auctioned off and the proceeds were donated to charity. Six months later, the work came up at another auction, but not in its entirety, as only one of the paintings was offered for sale, with the refrigerator door being detached. The author objected to the dismantling of the original work, with which the court agreed, as the use violated the integrity of the work.[201]

In the 1977 *Peanuts case*,[202] the famous characters of the comic book series created by Charles M. Schulz (Snoopy, Charlie Brown) were featured in obscene situations. The court found that if the parody is distinctive – the work of the author and the parody can be clearly distinguished –,[203] then freedom of expression in the use of the parody overrides the au-

194 Code de la propriété intellectuelle L121-7.

195 Code de la propriété intellectuelle L122-5.4. The provision in French is available at: *https://goo.gl/gmL9c2*. The provision is English is available at: *https://goo.gl/KQLk7W*.

Article L122-5 Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire: 4° La parodie, le pastiche et la caricature, compte tenu des lois du genre.	Article L122-5 Once a work has been disclosed, the author may not prohibit: 4°. parody, pastiche and caricature, observing the rules of the genre.

196 See also: Joffrain (2001) 760.

197 Amy Lai: The Right To Parody – Comparative Analysis of Copyright and Free Speech. Cambridge University Press, 2019. pp. 171–172.

198 Ana Ramalho: Parody in Trademarks and Copyright: Has Humour Gone Too Far. Cambridge Student Law Review, Vol. 5, No. 1, 2009. p. 66.

199 Foster (2013) 330 and Heide (1996) 248.

200 Buffet c. Fersing, Cour d'appel, Paris, 1962. See John Henry Merryman: The Refrigerator of Bernard Buffet. Hastings Law Journal, Vol. 27, 1976. p. 1024.

201 John Henry Merryman: Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law. Kluwer Law International, 2009. p. 406.

202 Les Peanuts. Trib. de. Gr. Inst. de Paris, January 19, 1977. Revues International de Droit D'auteur, Vol. 92, 1977. p. 167. Available at: *https://www.la-rida.com/fr/article-rida/2990?lang=fr.*

203 Neil W. Netanel: Why has Copyright Expanded? Analysis and Critique. UCLA School of Law Public Law & Legal Theory Research Paper Series, Research Paper, No. 07-34, 2007. p. 32. Available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066241*

thor's right to integrity.[204] Essentially the same decision was made by the court in the 1978 *Tarzoon case*,[205] in which the character of Edgar Rice Burroughs' "Tarzan" character was portrayed,[206] also in an obscene context, in the cinematographic work "Tarzoon, La Honte de la Jungle" ("Tarzoon, the Shame of the Jungle").[207]

In the 1992 *Godot case*,[208] the creative freedom of a theatrical director and the author's moral right collided, as Samuel Backett, the author of "Waiting for Godot," made it clear in his lifetime that the roles in his work could only be played by men,[209] but the theatrical adaptation deviated from this. The court gave priority to moral rights in the conflict between the two rights.[210]

The plaintiffs also pleaded infringement of their moral rights in the 2014 *Commissaire Crémèr case*. [211] The use embodied in the comic was meant to parody the character of a fictional French detective, Commissaire Maigret (the well-known character also appears in many novels, radio plays and films). The rightholders argued that their moral rights have been violated as a result of the original character being confused by the target audience with the new detective appearing in the parody. The court held that the use was humorous and differed from the original work to such an extent that there was no likelihood of confusion between the works, so it did not find a violation of moral rights.[212]

Finally, it is important to mention the 2015 *Dieudonné case*.[213] In a musical video, M'Bala dit Dieudonné parodied the work "l'Aigle noir" ("The Black Eagle") by Holocaust survivor and performer known as Barbara. The adaptation was entitled "Le rat noir" ("The Black Rat") and clearly conveyed an anti-Semitic message. In the court's view, although freedom of expression may restrict copyright, the use made by the defendant ("a parody of hatred") went beyond the legally permissible framework of expressing one's opinion and clearly infringes the author's moral rights.[214]

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[204] Fiona MacMillan: New Directions in Copyright Law. Edward Elgar Publishing, 2007. p. 32.
[205] Tarzoon. Trib. de. Gr. Inst. de Paris, January 3, 1978. See: Jacques (2015) 20.
[206] Rachel D. Murphy: Tarzoon v. Tarzan: A New Look at the Legal Status of Parody. Art & The Law, Vol. 5, 1979. p. 14–17.
[207] MacMillan (2007) 32.
[208] Godot. Tribunal de grande instance de Paris. Revues International de Droit D'auteur, Vol. 155, October 15, 1992. p. 225. Available at: *https://www.la-rida.com/fr/article-rida/3118?lang=fr*.
[209] Sápi Edit: A színpadi művek szerzői joga. Patrocínium, 2019. p. 139. Available at: *http://patrocinium.hu/wp-content/uploads/2019/02/S%C3%A1pi-Edit-A-sz%C3%ADnpadi-m%C5%B1vek-szerz%C5%91i-joga.pdf*.
[210] Laurence R. Helfer – Graeme W. Austin: Human Rights and Intellectual Property: Mapping the Global Interface. Cambridge University Press, 2011. p. 258.
[211] Commissaire Crémèr. La Cour de Cassation, 13-14.629. 4 September 2012. Available at: *https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029453424&fastReqId=718780014&fastPos=21*.
[212] Lai (2019) 179.
[213] Dieudonné. La tribunal de grande instance de Paris, January 15, 2015. Available at: *https://www.huffingtonpost.fr/caroline-mecary/condamnation-dieudonne-barbara_b_6513612.html*.
[214] Lai (2019) 179–180.

In our opinion, it can be concluded from French practice that in the case of uses that comply with a codified parody exception, moral rights do not take precedence over free use, however, legal restrictions and externalities outside copyright law may override the provided exception (especially when the use goes beyond the legally permissible framework of freedom of expression).[215]

III.4. Moral Rights in Hungary

To a certain extent, the Hungarian approach to moral rights is in line with the development of continental legal systems: they are traditionally based on the personal relationship[216] between the author and his work,[217] protect personal interests not covered by economic rights[218] and serve the author's moral recognition.[219] Although Hungarian law does not contain a general definition of moral rights,[220] it provides extensive protection for the recognition of the right to claim authorship, the right to publication and revocation of the work, the rights to integrity of a work and the right of the author to have his name indicated.[221]

In the approach of the HCA, moral rights may not be the subject of trade: they are not alienable,[222] they cannot be transferred in any other way, nor can they be waived.[223] These rights remain protected – during the term of protection – even after the death of the author (although not with unchanged content) and are enforceable by the person entrusted with their care or the author's heir.[224]

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[215] Ibid. 181–182.

[216] Gyenge Anikó: Alkotmányossági kérdések a szerzői jogban. Industrial Property and Copyright Review, 2003/5. Available at: *https://www.sztnh.gov.hu/hu/kiadv/ipsz/200310/01-gyenge.html*.

[217] Pogácsás Anett: A közkincs és a szerzői személyhez fűződő jogok. In: Koltay András – Darák Péter (ed.): Ad Astra Per Aspera: Ünnepi kötet Solt Pál 80. születésnapja alkalmából. Pázmány Press, Budapest, 2017. p. 600.

[218] Mezei Péter: A szerzői jog jövője (is) a tét – Gondolatok a Google Books könyvdigitalizálási projektről. Industrial Property and Copyright Review, 2011/5. p. 19. Available at: *https://www.sztnh.gov.hu/sites/default/files/kiadv/ipsz/201105-pdf/1110-szemle.pdf*.

[219] Schwertner Nikolett Beatix: A zeneművek szerzői jogi szabályozása egy zeneszerző szemszögéből. Industrial Property and Copyright Review, 2014/3. p. 74. Available at: *https://www.sztnh.gov.hu/sites/default/files/kiadv/ipsz/201403-pdf/03.pdf*.

[220] Gyenge Anikó – Békés Gergely: A Digital Rights Management szerzői jogi természetéről. Industrial Property and Copyright Review, 2006/1. p. 53. Available at: *https://www.sztnh.gov.hu/sites/default/files/kiadv/ipsz/200602-pdf/03_tanulmany%20gyenge_bekes.pdf*.

[221] HCA Chapter II.

[222] Kardos Andrea – Szilágyi Dorottya: Szellemi alkotások büntetőjogi védelme – I. rész. Industrial Property and Copyright Review, 2011/6. p. 13. Available at: *https://www.sztnh.gov.hu/sites/default/files/kiadv/ipsz/201106-pdf/1112-szemle.pdf*.

[223] Pogácsás Anett: A szerző jelentősége és művével való kapcsolata. Iustum Aequum Salutare, 2014/1. p. 155. Available at: *http://ias.jak.ppke.hu/hir/ias/20141sz/11.pdf*.

[224] Barta Judit: Építészeti alkotások szerzői jogi védelme és a gazdasági reklámozás némely összefüggései megtörtént esetek alapján. Industrial Property and Copyright Review, 2011/6. p. 105. Available at: *https://www.sztnh.gov.hu/sites/default/files/kiadv/ipsz/201106-pdf/06.pdf*. and Section 14(1) of HCA.

Given that in the case of uses of parody the right to have the author's name indicated and the right to integrity are of paramount importance[225] (as the exception can only be exercised in lawfully published works), this Chapter will focus only on these specific moral rights.

III.4.1. Indicating the Name of the Author

With regard to the author's right to have his name indicated, Hungarian law may face the same problem as other countries: according to Section 12(2) of the HCA, due to the moral nature of the economic right related to adaptation,[226] the name of the author of the original work has to be indicated.[227] Parody is primarily considered a special kind of adaptation, so the question arises: is it necessary to indicate the name of the author of the original work in uses for the purpose of parody? An interesting conflict of interest can be identified in this regard, as the author obviously has the right to claim authorship of the original work,[228] but at the same time he may have a serious interest in distancing himself from the message contained in the parody. In our view, given the nature of the specific use, the CJEU correctly approached the issue in the Deckmyn decision,[229] stating that the author of the original work may have a legitimate interest in not associating his work with certain content and that the parodist is not required to indicate the source of the original work.[230] However, if the author of the original work is not identified in the parody, perhaps it is also to be expected that the parody should be visibly and clearly detached from the original work.[231]

It is, of course, quite clear that under the current regulations of the HCA, the author has the right to object to the indication of his name on the parody.[232]

[225] See also: Pedro G. Salazar: The Acuff-Rose Parody Case: Give unto the Congress What is the Congress' and to the States What is the States'. Revista Juridica de La Universidad Interamericana De Puerto Rico, Vol. 29, No. 1, 1994. p. 171.

[226] Legeza Dénes: Egy paragrafus margójára – Adalékok a munkaviszonyban létrehozott művek szabályozásához. Industrial Property and Copyright Review, 2014/2. p. 108. Available at: *https://www.sztnh.gov.hu/sites/default/files/kiadv/ipsz/201402-pdf/05.pdf*.

[227] Gyertyánfy Péter: A szerzői jog bírói gyakorlata 2006-tól: A jogok keletkezése, forgalmuk; A személyhez fűződő jogok. Industrial Property and Copyright Review, 2013/3. p. 85. Available at: *https://www.hipo.gov.hu/kiadv/ipsz/201303-pdf/03.pdf*.

[228] Pogácsás Anett: A szerző fogalmának és jelentőségének alakulása napjainkban. In: Pogácsás Anett (ed.): Quærendo et creando. Ünnepi kötet Tattay Levente 70. születésnapja tiszteletére. Szent István Társulat, Budapest, 2014. p. 489.

[229] This is consistent with: Jacques (2015) 129.

[230] Deckmyn paragraphs [31], [33]. See also: Iona Silverman: The Parody Exception Analysed. Managing Intellectual Property, Vol. 254, 2015. p. 28.

[231] Lim (2018) 73.

[232] See Section 12(3) of HCA.

III.4.2. Right to Integrity

We may face a much more complex problem when examining the right to integrity of a work. Art. 10 of the Copyright Act of 1969[233] established an especially strong system of protection of integrity[234] when it stated that "*[A]ny unauthorised modification or use of the author's work shall be considered an infringement of his moral rights.*" However, the explanatory memorandum to the HCA (which replaced the Copyright Act of 1969) points out that the above mentioned provision "*resulted in excessive, unrealistic protection of the integrity of the work, which also served as a disproportionate and unreasonable restriction on the freedom of creation and performance.*" Consequently, the original version of the HCA (in force between 1999 and 2013) "reverted to the provision contained in Art. 6*bis* of the Berne Convention, which has proved its worth over several decades and is also flexible in adapting to technical progress", and with regard to the interpretation of Section 13 of the HCA, the explanatory memorandum clearly states that "*only the distortion or mutilation of a work or any other modification or impairment of the work which is prejudicial to the honour or reputation of the author shall be regarded as an infringement.*"[235]

This interpretation was applicable until the entry into force of Act XVI of 2013 (1 April 2013), which amended the HCA's above-mentioned provision in Section 13. The amendment formally makes only a minimal change of wording. However, according to the explanatory memorandum[236] to Act XVI of 2013[237] – although the provision between 1999 and 2013 was otherwise viable and performed well in practice –[238] in order to address the "*remaining concerns*", "*it must be made clear that any distortion or mutilation of the work shall be prohibited and the condition regarding the use's prejudicial nature to the honour or reputation of the author shall be only applicable in the case of modification or other misuse.*" The amendment therefore seeks to split Section 13 of the HCA, as a result of which the first provision of the sentence provides unconditional protection against all direct interference,

[233] Act III of 1969 on Copyright.
[234] Regarding the objective and subjective side of integrity, see Gabrielle Osorio: Does Literal Bohemian Rhapsody Infringe Copyright. Perth International Law Journal, Vol. 3, 2018. p. 61.
[235] Explanatory memorandum to Section 10-15 of HCA.
[236] Explanatory memorandum to Section 35 of Act XVI of 2013.
[237] Munkácsi Péter: Moral Rights and the Cultural Aspects of Hungarian Copyright Law. In: Mira Sundara Rajan (ed.): Cambridge Handbook on Intellectual Property in Central and Eastern Europe. Cambridge University Press, 2019. p. 66.
[238] Section 13 of HCA (in force between 1999 and 2013, and between 2013 and 2021).

Art. 13. The moral rights of an author are infringed by every kind of distortion and mutilation or any other modification or impairment of his/her work that is injurious to the honour or reputation of the author.	Art. 13. Any distortion, mutilation or other modification of the author's work or any other misuse relating to the author's work that prejudices the honour or reputation of the author, shall be considered an infringement of the author's moral rights.

while the second provision protects against indirect interference, provided that the author's honour or reputation is also damaged.[239]

Before revealing the critical remarks on this amendment, it should be noted that the Berne Convention regulates in this respect a minimum level of protection, so that the establishment of a stronger level of protection in the HCA is fully in line with the international legal framework. However, it should be noted that the vast majority of the legal literature[240] and even the Berne Convention's Commentary[241] clearly support the interpretation of the original, 1999 provision of the HCA, saying that any violation of the right to integrity is conditional on damage to the author's honour or reputation.[242]

At this point, it should be emphasized that the Hungarian Council of Copyright Experts (hereinafter CCE) addresses the issue of the integrity of the work in a number of its expert opinions, from which the following conclusions can be drawn. On the one hand, the CCE refers in several places to the above mentioned explanatory memorandum to the HCA, in which it was stated that the 1969 Hungarian Copyright Act's regulatory solution, according to which all unauthorized use, unconditionally violated integrity, was not appropriate.[243] On the other hand, in agreement with the Berne Convention, it indicates that infringement to the integrity of the work can only be invoked in the case of prejudice to the author's honour or reputation.[244] Furthermore, the CCE also mentions that Section 13 of the HCA protects only the essential elements of the work[245] and that infringement must always be examined in the light of the circumstances of the particular case.[246] It can also be an important addition in the context of parody that in several cases – typically related to architectural works – the CCE considered moral rights to be limited by certain external factors, primarily the right to property or public interest.[247] It was further found that the absence of infringement of economic rights does not mean that moral rights could not have been

[239] Gyertyánfy Péter: Repedések a hatályos szerzői jogi épületén. In: Grad-Gyenge Anikó – Kabai Eszter – Menyhárd Attila (ed.): Liber Amicorum – Studia G. Faludi Dedicata: Ünnepi tanulmányok Faludi Gábor 65. születésnapja tiszteletére. ELTE Eötvös Kiadó, Budapest, 2018.

[240] Phyllis Amarnick: American Recognition of the Moral Right: Issues and Options. Copyright Law Symposium, Vol. 29, 1979. p. 31, Heide (1996) 225, Lim (2018) 90, Lipton (2011) 546. and Lai (2019) 52.

[241] WIPO: Guide to the Berne Convention for the Protection of Literary and Artistic Works. Geneva, 1978. p. 42. Available at: *https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf*.

[242] See also: Paku Dorottya Irén: Digitális Sampling a magyar és német szerzői jogban – I. rész. Industrial Property and Copyright Review, 2019/4. pp. 88–89. Available at: *https://www.sztnh.gov.hu/sites/default/files/files/kiadv/szkv/szemle-2019-4/04.pdf*.

[243] CCE 2/2001, CCE 35/02, CCE 18/2003, CCE 4/2004, CCE 7/2004. and CCE 1/2006.

[244] CCE 2/2001, CCE 19/2002, CCE 35/2002, CCE 4/2004, CCE 7/2004, CCE 26/2004, CCE 1/2006, CCE 06/07/01, CCE 38/07/01, CCE 17/10, CCE 18/10, CCE 19/12. and CCE 13/13.

[245] CCE 7/2004, CCE 18/10, CCE 25/10, CCE 02/13. and CCE 40/15. See also: Pogácsás Anett: Szerzői jog újratöltve. Industrial Property and Copyright Review, 2010/6. p. 34. Available at: *https://www.sztnh.gov.hu/sites/default/files/kiadv/ipsz/201012-pdf/02.pdf*.

[246] CCE 37/2001. and CCE 30/2003.

[247] CCE 18/09, CCE 38/07/01. and CCE 13/13.

infringed[248] and that infringement of the rights contained in Chapter II of the HCA also makes it impossible to comply with the three-step test.[249]

In expert opinion 1/2006 the CCE states that "*Both the rights to property and copyright (its economic and moral elements) enjoy constitutional protection. In the event of a collision between these rights, one of them will necessarily be restricted. In such cases, neither the «natural» internal limits of copyright [the term of protection that limits copyright in time (HCA Section 31) or the free uses (HCA Chapter IV, Section 33-41], nor the restrictions on property rights rooted in the Civil Code are in themselves sufficient to eliminate the conflict.*" From this, the question may also arise – *a contrario* – whether free uses, as an internal limitation to copyright, may provide a possibility for the legislator to strike a balance between colliding fundamental rights. If the answer to the above question is in the affirmative, must a parody exception take account of freedom of expression? Is it also possible to limit moral rights on that basis?

It is also worth noting that there have been several comments in Hungarian papers following (or even before)[250] the 2013 amendment of Section 13 of the HCA that the 1999 version of the provision provided the correct interpretation[251] and the explanatory memorandum to the amendment did not really clarify the rationale or necessity for the modification.[252] Although Faludi stated – in 2011 – that the two different interpretations could have been reconciled,[253] in our view, given the purpose of the provision and its accepted international interpretation, the text in force between 1999 and 2013 seems more justified. The debate was closed by Act XXXVII of 2021 (which came into force on 1 June 2021), which amended once again Section 13 of the HCA, restoring the provision to its original (1999) meaning, which is consistent with Art. 6*bis* of the Berne Convention.[254]

Finally, it can be an important addition in the context of parody that the assessment of integrity should – in principle – be adapted to the circumstances of the case, including the

[248] CCE 18/10.
[249] CCE 19/17.
[250] Békés Gergely – Mezei Péter: A sampling megítélése a magyar szerzői jogban. Industrial Property and Copyright Review, 2010/6. pp. 20–21. Available at: *https://goo.gl/XpsZ9d*.
[251] Mezei Péter: Elképzeltem: nem lenne jó. In: Pogácsás Anett (ed.): Quærendo et creando. Ünnepi kötet Tattay Levente 70. születésnapja tiszteletére. Szent István Társulat, Budapest, 2014. p. 413; and Paku (2019) 89.
[252] Sápi Edit: A hazai szerzői jogi jogalkotás fontosabb állomásai. Industrial Property and Copyright Review, 2019/6. pp. 66–67. and Sápi (2019) 151.
[253] Faludi Gábor: A szerzői mű egysége védelmének egyes kérdései. Infokommunikáció és Jog, 2011/5. p. 166.
[254] From 1 June 1, 2021. Section 13 of the HCA states „The personal rights of an author shall be considered violated by every kind of distortion and defamation or alteration in any manner or any form of misuse of his or her work which prejudices the integrity or reputation of the author."

specific type of work[255] and the particular form of use.[256] Consequently, in examining the infringement of integrity, it should be taken into account that parody uses can be of added value as an accepted means of expression.

III.5. A Partial Conclusion

Although moral rights raise serious questions about parody at the international level, the Hungarian approach puts the legislator in a particularly difficult position when considering the inclusion of the parody exception in the HCA.

This stems essentially from the approach that free uses, while undoubtedly affecting moral rights at several levels, are fundamentally intended to limit economic rights. Regulating a specific parody exception would therefore not in itself mean that the exception also affects moral rights.[257] With regard to the right to name indication, as explained above, the omission of the obligation to indicate the source (which, in our view, should be upheld in accordance with the Deckmyn decision) would indirectly limit the right under Section 12 of the HCA.

The real difficulty, however, is to reconcile parody with the right to integrity. It is perhaps beyond dispute that parody by its very nature affects the integrity of the work:[258] In the process of parodying, the original work is altered, which in some cases includes mutilation or distortion of the work. Criticism in parody is often sharp, sometimes downright obscene, it may target both the work and its author. As Weir puts it, "*[s]ince parody is aimed at the author's modes of expression and characteristic turns of thought or phrase, it is principally an attack upon the author's personality manifested in his or her creation.*"[259]

The questions arising from the collision between moral rights and parody could be – at least partially – answered by the legal framework of freedom of expression if the question is judged according to the interpretation of the Berne Convention.[260] The situation is com-

[255] Pogácsás Anett: Garancia vagy akadály? A szerzői jogról való lemondás tilalmának helye egy rugalmas szerzői jogi rendszerben. Infokommunikáció és Jog, 2017/1. p. 40. Available at: *https://infojog.hu/wp-content/uploads/pdf/201768_38_45_PogacsasAnett.pdf*.

[256] Grad-Gyenge Anikó (ed.): Kézikönyv a szerzői jog érvényesítéséhez. ProArt, 2019. p. 73.

[257] Faludi (2015) 117.

[258] Sheldon N. Light: Parody, Burlesque, and the Economic Rationale for Copyright. Connecticut Law Review, Vol. 11, No. 4, 1979. p. 617.

[259] Moana Weir: Making Sense of Copyright Law Relating to Parody – A Moral Rights Perspective. Monash University Law Review, Vol 18, No 2, 1992. p. 196.

[260] See also: Koltay András: A közéleti szereplők hírnév- és becsületvédelme Európában. In: Pogácsás Anett (ed.): Quærendo et creando. Ünnepi kötet Tattay Levente 70. születésnapja tiszteletére. Szent István Társulat, Budapest, 2014. p. 319. and Koltay András: A becsület, a jóhírnév és az emberi méltóság fogalmi elhatárolása a magyar magánjogban. In: Koltay András – Darák Péter (ed.): Ad Astra Per Aspera: Ünnepi kötet Solt Pál 80. születésnapja alkalmából. Pázmány Press, Budapest, 2017. pp. 435–458.

plicated by the fact that acquiring authorization is not a viable alternative for parody,[261] as in many cases the author of the original work may have an explicit interest in not having the parody made. In our view, the exception must not leave uses unrecognised that are not infringing the integrity right and are within the legally recognised boundaries of freedom of expression.[262]

IV. THE PREVIOUS HUNGARIAN STANDPOINT ON PARODY

As the HCA did not previously contain an exception for parody, it did not, of course, contain a definition or other reference to this use. However, one of the goals of this paper is to explore the arguments by which the Hungarian legislator has not previously transposed the optional exception provided for in the InfoSoc Directive, and then to clarify whether these arguments could be considered valid.

IV.1. Parody in the Light of the Expert Opinions of the CCE and Hungarian Legal Literature

The CCE has addressed the Hungarian copyright regime's approach to parody in several expert opinions. First of all, there are relevant findings in CCE's expert opinion 39/2002, stating that on the one hand, there is no judicial practice relating to parody in Hungary,[263] and on the other hand, it names several characteristics that uses of parody usually have. Parody thus exaggerates the style of the original work, or presents the characteristic features of the author's works in a humorous way, and it also may be characterized by "devastating critique".[264] In light of this, the definition of parody in the CCE's interpretation covers not only strictly parody, but also the mocking imitation of the author's style.

CCE's expert opinion 13/2003 contributes additional aspects to the interpretation of the definition of parody. In its interpretation, the necessary element of parody is to evoke the original work, but it is important that the new, original elements predominate in the work created through adaptation. In addition, it is particularly interesting that in the CCE's view, in Hungarian copyright, the adaptation subject to a licence and a parody as a free use can in principle be distinguished (even without an exception in the HCA).[265]

[261] Foster (2014) 339, Lim (2018) 73. and Sangwani Patrick Ng'ambi: Parody: A Defence for the Defenceless Satirist. Zambia Law Journal, Vol. 41, 2010. pp. 17, 22.
[262] Jacques (2015) 195.
[263] Grad-Gyenge Anikó: Film és szerzői jog – A megfilmesítési szerződés. Médiatudományi Intézet, 2016. p. 66.
[264] CCE 39/2002. Available at: *https://goo.gl/DXh59j*.
[265] CCE 13/2003. Available at: *https://goo.gl/sQe8eA*.

These thoughts are further detailed in CCE's expert opinion 16/08. The CCE interprets parody as a well-known instrument of intellectual debate and as a "*particular internal limitation recognized by copyright, serving the constitutional right of freedom of opinion*". In order to acknowledge parody in copyright law as free use, it is also objectively necessary to evoke the original work and that the parodist acquire an independence, "*distance*" his work from the original by creative activity, an original work through individual creation. The expert opinion explains that parody is "*an exception from the right of adaptation, but not to be considered as an expressly mentioned free use.*" The elements that can be taken over without permission are the parts that are necessary for evoking and for expressing opposition to the original work. Finally, the CCE – and it is interesting whether this contradicts its expert opinion 39/2002, which says that the imitation of the author's style also falls within the concept of parody – explains that imitation of style is covered by Section 1(6) of the HCA,[266] and thus is not subject to exclusive rights.[267]

In his study on the copyright perception of parody, Faludi also refers to CCE's expert opinion 16/08. He concludes that in his view there is no need to add a parody exception to the HCA, as parody's "*purest form*" draws so little from the original work that it does not reach the level of adaptation, "*it fits within the framework of quotation, the most typical free use*", and the copyright approach to parody should be – in any case – subject to a case-by-case examination by the court.[268] In connection to this, it should be noted that the recognition of parody through the exception of quotation – as e.g. it is also the case in Italy and the Czech Republic – although not unprecedented, is far from being the dominant approach. Furthermore, it was a problem that certain genres were inherently excluded from the free use of quotation in Hungarian copyright law, such as works of fine art (this approach was modified by the transposition of the CDSM Directive). Nevertheless, uses of parody typically go beyond this form of free use.

Grad-Gyenge in her monograph on copyright exceptions and limitations also touches on the issue of parody. In her view, there is no need to introduce an exception in the HCA, as the transposition of the parody exception from the InfoSoc Directive would only allow "*the works concerned to be used unaltered by the parodist*".[269] The Deckmyn decision presented above – which was reached well after the publication of the monograph – does not necessarily suggest this, although there is no doubt that the CJEU could not include the right of adaptation in its judgment as it is not a harmonized economic right. She also explains that

[266] HCA Section 1(6) "Ideas, principles, theories, procedures, operating methods, and mathematical operations shall be excluded from copyright protection."
[267] CCE 16/08. Available at: *https://goo.gl/n6TxhT*.
[268] Faludi (2015) 95, 112 and 115.
[269] However, in countries where the exception was introduced after EU accession, such as Lithuania, the texts adopted suggest a more flexible interpretation.

some forms of parody – such as the pastiche – do not require a licence and parodies are in many cases covered by the quotation exception.[270]

The Commentary to the HCA[271] also addresses the issue of parody. Similarly to the above-mentioned standpoint of the CCE and relevant studies, the Commentary addresses the problem of evocation and imitation of style, and states that the distinction between uses that require a licence and parody as free use (even without an exception in the HCA) requires an individual examination in each case.

For the sake of completeness, it is also necessary to refer to the Copyright Act of 1969, which provided for a narrow recognition of parody uses in Section 17(3),[272] but this provision was repealed in 1994 due to its conflict with the Berne Convention,[273] and thus was not transferred into the HCA.

IV.2. Lessons learned from DC Comics v HVG Lapkiadó Kft.

For the first Hungarian legal dispute concerning the copyright assessment of a parody, we had to wait until 2018. The subject of the lawsuit between *DC Comics and HVG Lapkiadó Kft.*[274] was the display and adaptation of DC Comics' oldest and maybe most famous character, Superman. The cover of the 8 September 2016 issue of the weekly paper entitled HVG displayed Superman's iconic motion: the stretching of his shirt with both hands and revealing the famous "S" symbol.[275] Because the use took place without authorization of the rightholder, DC Comics filed a civil lawsuit.

[270] Gyenge Anikó: Szerzői jogi korlátozások és a szerzői jog emberi jogi háttere. HVG-ORAC, Budapest, 2010. pp. 222–225.

[271] Gyertyánfy Péter (ed.): Nagykommentár a szerzői jogról szóló 1999. évi LXXVI. törvényhez. Online version, 2019. See the commentary to adaptation.

[272] Act III of 1969 on Copyright, Art. 17(3) "A foreign work may be used to create a new, independent work; however, this right shall not extend to the adaptation of a foreign work for the purposes of stage, film, radio or television, or to to adaptation in the same genre."

[273] Faludi (2015) 100.

[274] Special thanks are due to László Bérczes, Founding Partner of Bérczes Law Firm, the legal representative of the plaintiff, for making the decisions related to the case available for scientific research.

[275] Czeglédi Ádám Sándor: Case law update – az elmúlt egy év legfontosabb védjegyjogi tárgyú döntései Magyarországon és az EU-ban. Presentation at the Hungarian Industrial Property and Copyright Association's conference, 21 November 2019. Available at: *http://mie.org.hu/2019_osz/Czegledi_DC_Comics_HVG.pdf*.

5. Hungarian edition of the first issue of the Superman comic (right) and the cover of HVG's issue in question (left) (source: kepregenyaruhaz.hu, hvg.hu)

The Budapest-Capital Regional Court (*Fővárosi Törvényszék*) requested the CCE's expert opinion to substantiate its own decision, in which the CCE seems to have refined some of its previous standpoints on the issue of parody.

> "*The acting council notes that the Hungarian Copyright Act does not include free use for parody purposes. Although Art. 5(3)(k) of EU's 2001/29/EC Directive allows Member States to introduce free use for parody purposes, it leaves the transposition of the exception to the discretion of Member States. The Hungarian legislator did not introduce this free use when it amended the HCA by Act CII of 2003 for the purpose of legal harmonization.*"[276]

[276] CCE 07/19, point 2.

However, despite the above, the acting council refers back to CCE's expert opinion 16/08, stating that "*parody, as an internal constraint on copyright, is a form of exercising freedom of expression, which is regulated in the Charter of Human Rights and the European Convention on Human Rights and protected by the Hungarian Constitution, recognized whether it be a parody of a person or a copyrighted work or performance.*" [277] At the end, the expert opinion leaves the question open and leaves it to the discretion of the court to make the decision, as follows.

> "*The parody exception therefore exists in Hungarian copyright law according to some opinions in the legal literature. The main issue is whether it should be included in the HCA as an explicitly named free use or whether the fundamental rights basis is sufficient, i.e. whether the fundamental right argument can override the HCA's regulatory principle that only free uses that are explicitly named by the Act can be invoked.*"[278]

Pursuant to the decision of the Budapest-Capital Regional Court, the defendant argued during the proceedings, inter alia, that the use was "*a kind of parody of the original work that creates a new work without requiring the plaintiff's permission. The depiction undoubtedly takes over some of the style elements of the character Superman, but it is a new work with a narrative that contrasts with the narrative of the original work, a use which is not subject to the plaintiff's authorization.*" [279] The defendant also refers to the reasoning of CCE expert opinion 16/08[280] in relation to imitation of style, basing its argument on that the use took over only elements of style or parts that are unprotected by copyright. The Budapest-Capital Regional Court concluded the dispute regarding parody very briefly,[281] interpreting CCE's export opinion[282] in the case as "*the Hungarian Copyright Act does not provide for free use for parody purposes, which makes the defendant's defence in this regard weightless.*"[283]

[277] Ibid.
[278] Ibid.
[279] Budapest-Capital Regional Court 3.P.23.174/2018/26.
[280] E.g. CCE 16/08. „ If a parody only parodies a style or an element that is not protected by itself, the question of adaptation does not arise."
[281] See also: Ujhelyi Dávid: Paródiával kapcsolatos döntés született Magyarországon. Copy21 blog, blog post, 3 May 2020. Available at: *http://copy21.com/2020/05/parodiaval-kapcsolatos-dontes-szuletett-magyarorszagon/*.
[282] It should be noted that when CCE's expert opinion 07/19 was finalized, the decisions in Case C-476/17 Pelham, C-469/17 Funke Medien GmbH and Case C-516/17 Spiegel Online GmbH cases were unfortunately not yet available to the acting council, but their content would have been an interesting addition to the proceedings.
[283] Budapest-Capital Regional Court 3.P.23.174/2018/26.

In the appeal proceedings, the decision[284] of the Budapest-Capital Regional Court of Appeal (*Fővárosi Ítélőtábla*) – which included the relevant parts of HCA's Commentary –,[285] reached the same conclusion as the Budapest-Capital Regional Court saying "*[s]ince the Hungarian Copyright Act does not provide for a free use for parody, therefore the plaintiff's authorization would have had to be sought for the adaptation. Failing that, the defendant's use is infringing*."[286]

IV.3. A Critical Analysis of the Previous Hungarian Approach to Parody

We partly agree with what has been said so far about the judgment made on parody and described in this Chapter, but on some points we would like to take an opposing view.

It is beyond dispute that for uses of parody it is essential to evoke the original work, the conclusions of the Deckmyn decision[287] at EU level and the US case law's *conjure up* condition[288] show the same picture. However, in order for an adaptation[289] to result in an original work protected by copyright law,[290] the parody must also have an original character, in a quality that gives a proper basis for the independent protection of the adapting work. It also seems correct to state that, under Section 1(6) of the HCA, imitation of the author's style does not constitute a relevant use from a copyright point of view and can therefore be made use of without the authorization of the rightholder or a licence fee. We also agree with Grad-Gyenge and Faludi in that, in some cases, parody falls within the scope of the quotation exception, although due to the problems explained above, this exception is only partially capable to cover parodies.

However, in our view, consideration needs to be given to identifying parody as a free use case even without an explicit exception in the HCA. According to the interpretation expressed in CCE's expert opinion 16/08, parody is an instrument of freedom of expression

284 Budapest-Capital Regional Court of Appeal 8.Pf.20.424/2019/5.

285 HCA Commentary "Parody necessarily makes the parodied work recognizable. It has the effect of adding new – exaggerated – features to the original work. Parody is a controversy – in content or artistic form – over the original work, a contrast, in which the parodist indirectly attributes a different content and form to the original work and this triggers a comic effect. Some parodies – if, on the one hand, the original work fades in them and the individual style of the parodist becomes recognizable, and, on the other hand, significant original features prevail against the original work – may qualify as new, independent works."

286 BDT 2020.2. Bírósági Döntések Tára, 2020/1. pp. 10-14.

287 Griffiths (2017) 5.

288 Robyn M. Flegal: Diametrically Opposing Viewpoints – Why Polar Opposites Should Not Attract the Parody Label Under the Fair Use Exception to Copyright Infringement. Journal of Intellectual Property Law, Vol. 21, 2013. p. 112.

289 Pogácsás Anett: Különbözőség az egységben – A szerzői jogi szabályozás differenciálódásának hatása a jogterület szerepére és hatékonyságára. Pázmány Press, Budapest, 2017. p. 114. Available at: *http://mek.oszk.hu/18600/18679/18679.pdf*.

290 Mezei Péter: Mitől fair a fair? Szerzői művek felhasználása a fair use-teszt fényében. Industrial Property and Copyright Review, 2008/6. p. 57.

– which fundamental right is protected in Article IX of the Fundamental Law of Hungary, thus becomes, to some extent, an internal limitation of copyright law[291] on the basis of legal hierarchy – and thus parody's explicit codification as free use is not necessary. At the same time, the interpretation of freedom of expression[292] (which according to some ideas is also the source of copyright law itself) [293] as an external limitation to copyright law does not necessarily mean that it is possible to speak of free uses that are not explicitly mentioned in the HCA. This reasoning seems to contradict the prohibition of the broad interpretation of free uses mentioned in Section 33(3) of the HCA[294] and the fact that the HCA defines the cases of free use by means of an *exhaustive list from which no derogation is allowed*, as the relevant studies confirm.[295] However, it follows that Hungarian copyright law recognizes only those cases of free use that have expressively been codified in the HCA – excluding, of course, those that do not qualify for use from a copyright point of view, e.g. *de minimis* behaviours. On this basis, the category of free uses without explicit exception in CCE's expert opinion 16/08, appear to be an unreasonably extensive interpretation and therefore contrary to the HCA.[296] In principle, the connection between free uses without explicit codification and the three-step test seems also problematic, and raises a number of questions: does this category fall under the provisions of the three-step test (if yes, what is the legal basis for it?), or should it be interpreted outside the test (in this case, how can it be reconciled with obligations under international and EU law)?

Moreover, this argument does not appear to be satisfactory from the point of view of legal certainty, because users generally are not expected to have such a high level of dogmatic knowledge of copyright law. On the other hand, from the legislation itself it could have been concluded that Hungarian copyright law did not have a parody exception, so the user must apply for authorization from the rightholder in connection with the parody and is obliged to pay a licence fee. The fact that the use *may* be covered (narrowly) by the quotation exception means very little in practice, not to mention the fact that the purely dogmatic argument put forward by the CCE – concerning the explicitly not codified exceptions – is not guaran-

[291] Faludi Gábor: A szerzői jog és az iparjogvédelem belső korlátjai. Jogtudományi Közlöny, 2006/7–8. pp. 280–292.

[292] See also: Faludi Gábor: A szerzői jog alapjogi szemlélete az Európai Unióban. In: Faludi Gábor (ed.): Liber amicorum: studia P. Gyertyánfy dedicata: ünnepi dolgozatok Gyertyánfy Péter tiszteletére. ELTE ÁJK Polgári Jogi Tanszék, Budapest, 2008. pp. 185–209.

[293] Kim Treiger-Bar-Am: Kant on Copyright: Rights of Transformative Authorship. Cardozo Arts & Entertainment, Vol. 25, No. 3, 2008. p. 1066.

[294] HCA Section 33(3) "The provisions pertaining to free use shall not be given a broad interpretation.."

[295] Kiss Zoltán: Kommentár a szerzői jogról szóló 1999. évi LXXVI. törvényhez. Online version. "Detailed and […] non-derogatory rules on free uses are justified by the nature of free use. […] Therefore, the balance between copyright protection and the user's (society's) interests can only be maintained if the scope of free use is strictly limited by law."

[296] This derivation would otherwise seem acceptable if the three-step test were not interpreted as a general restriction or framework of free use, but – like the US fair use test – as an open-ended form of free use. See also: European Copyright Society (2014) 7.

teed to be upheld by court in a possible litigation (as we have seen in the DC Comics v HVG Lapkiadó Kft case above). In our opinion, the Budapest-Capital Regional Court of Appeal's judgment 8.Pf.20.424/2019/5 gave a clear answer on this subject: the category of explicitly not codified free uses – *de iure* – does not exist in the Hungarian copyright regime, and it cannot be successfully invoked – *de facto* – in court.

In our view, parody has an added value[297] by catalysing not only freedom of expression[298] but also the exchange of opinions, which can – without further ado – be a justification for creating an explicit codified exception to protect and incentivise this widely known and essentially several centuries old form of use.

IV.4. A Partial Conclusion

The previously dominant Hungarian standpoint – both the relevant studies and the CCE's expert opinions – did not consider it necessary to transpose an exception covering parody. In our view, several factors, in particular the decision of the Budapest-Capital Regional Court of Appeal reached in 2019, point in the direction that this position could not provide an adequate answer to either the dogmatic issues or the challenges arising in practice. In our opinion, this approach was justifiably reviewed when Hungary transposed the CDSM Directive in order to comply with the obligation of harmonization laid down in Article 17(7) thereof.

U.S. case law is an excellent example of how users and creators need a clear, flexible, and well-defined environment in order to achieve the goals of copyright, including incentivising creativity.[299] Thus, the fact that this question comes up rarely in Hungarian practice is not, in our view, indication the lack of reasons for the transposition of the parody exception.[300] On the contrary, it should provide justification for the fullest possible transposition of the free use in question.[301]

[297] Marlin H. Smith: Limits of Copyright: Property, Parody, and the Public Domain. The Duke Law Journal, Vol. 42, No. 6, 1993. p. 1248.

[298] Michael Bechtel: Algorithmic Notification and Monetization: Using YouTube's Content ID System as a Model for European Union Copyright Reform. Michigan State International Law Review, No. 28, Iss. 2, 2020. p. 256.

[299] See also: Ujhelyi (2014) 34–52. Available at: *https://goo.gl/IPYzaG*.

[300] Cf. Faludi (2015).

[301] In our view, parody disputes may arise in a higher number from an existing exception, not from the absence of an exception. However, the lack of litigations may be due to the fact that users request permission for significant or more serious parody uses, but this does not address the deadweight arising from the licensing obligation (if the use is subject to authorization, many users will not make the parody or will not receive a licence from the rightholder), on the other hand, "non-significant" parodies are placed in a grey area where, although they would require a licencelicense, are made without one and are made available to the public in an unlawful manner. A full exploration of this would require a comprehensive, empirical study on the relationship between contractual practice and parodies.

Freedom of expression[302] plays a particularly important role in copyright law, and its conflict with property rights affects many provisions of the copyright regime's philosophical foundations. Parody, as a long-standing and well-known form of freedom of expression, represents an added value that has the potential to catalyse the exchange of views. Therefore, it seemed unreasonable for the Hungarian legislator to leave this aspect without recognition for so long.

In our view, parody is not just a curious form of use that can be protected and recognized – case by case – only on a narrow basis, without a specific exception. Parody is a critical and creative genre with deep roots in fundamental rights. Parody is recognised internationally and has social value, it is a very special form of use and could serve as a fertile ground for creativity.

V. THE TRANSPOSITION OF THE HUNGARIAN PARODY EXCEPTION IN HUNGARY

The transposition works of the CDSM Directive were carried out by the Ministry of Justice of Hungary – in close cooperation with the Hungarian Intellectual Property Office –, from late summer of 2019 and were finished with Act XXXVII of 2021 which amended the HCA as of 1 June 2021. With this, Hungary became the second Member State of the EU to fully transpose the CDSM Directive – after the Netherlands – and the first to transpose the SatCab II[303] Directive.

During the transposition works the Ministry of Justice held six public workshops focusing on specific regulations of the CDSM and SatCab II Directives. There were also several informal and formal public consultations in the legislative process, reaching out directly to more than 150 associations of rightholders and users, aiming to bring a high level of transparency to the process of transposition.[304]

Art. 8 of Act XXXVII of 2021 amended the HCA with Section 34/A, the provision containing the exception for parody and also criticism and review. The final text goes as follows.

[302] William McGeveran: The Imaginary Trademark Parody Crisis (and Real One). Washington Law Review, Vol. 90, 2015. p. 727.

[303] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0789&qid=1646060822998&from=en*.

[304] See more: Baranyi Róbert – Ujhelyi Dávid: A digitális szerzői jogi szabályozás legújabb lépcsője – a CDSM irányelv átültetésének háttere és eredményei. Fontes Iuris, 2021/3.

"*Section 34/A*
(1) A work
a) for purposes such as criticism or review, provided that the source, including the author's name, is indicated; and/or
b) for purposes such as caricature, parody or style imitation (pastiche), by evoking the work and expressing humour or mockery
may be used by anyone.
(2) As regards the uses under paragraph (1), borrowing from the original work shall be limited to the extent justified by the purpose to be achieved."

This Chapter aims to shed light on the questions that had to be dealt with during the transposition process of Art. 17(7) of the CDSM Directive and Art. 5(3)k of the InfoSoc Directive, and on the reasoning behind the final text of HCA's parody exception.

1. The proper place of the parody exception in the HCA. During the transposition, it was not disputed that the parody exception should be placed in Chapter IV of the HCA, which regulates free uses. However, there was some scope for discretion regarding its placement within the chapter. Chapter IV of the HCA regulates exceptions that cover all economic rights at the beginning of the exhaustive provisions and then lists the exceptions grouped according to their purpose and the specific economic rights concerned.

The Hungarian legislator has transposed the parody exception not only in the narrow way made mandatory by the CDSM Directive, but also on the basis of the authorization given by the InfoSoc Directive. In the light of the Hungarian dogmatic approach, the economic right of adaptation has the closest connection to the exception (although obviously other economic rights are also affected).[305] Section 34 of the HCA regulates quotation, borrowing and adaptation of works for educational purposes. Thus, amending Section 34 of the HCA or introducing a new Section 34/A both seemed justified. However, these free uses did not show such a very close relationship with parody that would have justified the amendment of Art. 34 of the HCA, so introducing a new article (Art. 34/A) seemed more reasonable in this respect.

2. Integrating the exception in the HCA's dogmatic framework. The integration of the parody exception in Chapter IV of the HCA has had a number of consequences which, although not explicitly stated in the law, are clear from the dogmatic structure of the HCA. For example, the provisions of the three-step test set out in Section 33(2) of the HCA – which is a

[305] The InfoSoc Directive allows for limitation on the right of reproduction and communication to the public, the CDSM Directive allows for limitation on the new aspect of communication to the public under Art. 17 and the right of adaptation is not harmonized in EU law.

unique interpretation of the test –[306] will clearly apply[307] to the newly introduced exception, so legitimate parody may not be conflict with the normal exploitation of the work, may not unreasonably prejudice the authors' legitimate interests without justification, it must fulfil the requirements of fairness and its goal may not be inconsistent with the purpose of free use.

It is also worth noting that, based on the authorization for exception in the InfoSoc Directive and the CDSM Directive, and also the interpretation of the Deckmyn decision, the exception does not only cover the cases in which the parody results in an original work, it covers reproduction as well (where the parody does not result in a new, original work).

A similarly interesting question arises with regard to pastiche, as in the Hungarian copyright system, with regard to Section 1(6) of the HCA, the imitation of the author's style is not considered a use to be covered by the author's exclusive rights,[308] so in this case the applicability of the exception does not arise.

In this context, it is necessary to indicate, that every exception provided for in Chapter IV also applies to related rights under Section 83(2) of the HCA.[309]

3. Parody, caricature and pastiche. Both the InfoSoc Directive and the CDSM Directive allows the parody exception to cover three genres: parody, caricature, and pastiche. The exception in Section 34/A of the HCA ultimately – as a compromise – named all three genres however, in our view, the naming of all three genres within the exception is redundant from both a dogmatic and codification point of view.

Paragraph 42 of the Advocate General's opinion in Deckmyn cites that "*the three concepts are too similar for it to be possible to distinguish between them*" and the CJEU– indirectly accepting this – deals only with parody in its judgement and does not examine the issue of caricature or pastiche.[310] Both practice[311] and literature[312] of other countries – in practice – seem to be guided by the view that naming all three genres is unnecessary, and parody, as the broadest genre of the three, essentially covers the other two genres. In our view, naming

[306] See more: Ujhelyi Dávid: "That escalated quickly", avagy a háromlépcsős teszt és a paródia kapcsolódási pontjai – I. rész. Industrial Property and Copyright Review, 2019/6. pp. 7-41. and Ujhelyi Dávid: "That escalated quickly", avagy a háromlépcsős teszt és a paródia kapcsolódási pontjai – II. rész. Industrial Property and Copyright Review, 2020/1. pp. 7-30.

[307] See also: P. Bernt Hugenholtz (ed.): Harmonizing European Copyright Law – The Challenges of Better Lawmaking. Kluwer Law International, 2009. p. 113.

[308] Cf. Sotiris Petridis: Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche. Quarterly Review of Film and Video, Vol. 32, No. 8, 2015. p. 733.

[309] HCA Section 83(2) "The authorization of holders of related rights shall not be required in cases where the Act does not require the authorization of the author for the use of a work under copyright protection. […]"

[310] Jacques (2019) 25–26. and Villalón (2014) paragraph 42.

[311] See Loew's Incorporated v. Columbia Broadcasting System. 131 F. Supp. 165 (S.D. Cal. 1955). Available at: *https://casetext.com/case/columbia-pictures-corp-v-national-broadcasting-co*.

[312] See eg. Charles C. Goetsch: Parody as Free Speech – The Replacement of the Fair Use Doctrine by First Amendment Protection. Western New England Review, Vol. 3, 1980. p. 43.

each genre without defining them could lead to legal uncertainty, while covering all three with parody would have made the exception clearer and better defined.

It is also worth mentioning that the CDSM Directive also makes it mandatory to provide an exception for quotation, criticism and review. With regard to quotation, Section 34(1) of the HCA is clearly an appropriate exception, however, the copyright approach to uses of criticism and review was not clearly and explicitly declared in the HCA, even if the issue does not appear to be unsettled from a dogmatic point of view.[313] Consequently, in addition to parody, it was necessary to provide a place in Section 34/A for free uses covering criticism and review as well.

4. The scope of the exception, the economic rights concerned. Art. 17(7)(b) of the CDSM Directive put the legislator before crossroads, when it made the parody exception mandatory only in the context of online content-sharing service providers, not in the broader sense of Art. 5(3)(k) of the InfoSoc Directive. Consequently, the national legislator may, in principle, have had the possibility to decide to introduce the parody exception only in respect of the new aspect of communication to the public laid down by the CDSM Directive and to preserve the exclusive rights of the author in respect of all other economic rights.

In our view, the above mentioned narrower form of transposition would not have been suitable for achieving the objectives pursued by regulating a parody exception, in particular to achieve a balance between the author's exclusive rights and freedom of expression.[314] On the other hand, this could have raised practical problems: limiting only the author's communication to the public right is not enough to ensure – on a practical or legal level – the making and exploiting of parodies, which requires the parodist to reproduce, adapt and borrow from the original work. On this basis, it seemed necessary for the legislator to exercise the authorization provided not only by the CDSM Directive but also by the InfoSoc Directive and to regulate the parody exception in its fullest possible form.[315]

In this context, it is necessary to point out that the parody exception not only excludes the making of a parody from the author's exclusive rights, but also covers acts related to the exploitation of the created parodies. This follows from the logic of the authorization of the CDSM Directive and is also necessary to provide the proper exercisability of freedom of expression.

[313] The HCA approaches review in Art. 12(1) from the point of view of the right to name indication, the CCE's expert opinion 11/07 with regard to the criticism makes the following statement. "It shall not be regarded as quotation (as free use) to highlight or incorporate shorter excerpts from articles if it is not strictly for illustrative, review, critical, or self-supporting purposes. […]"

[314] See also: Christophe Geiger – Elena Izyumenko: Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression. International Review of Intellectual Property and Competition Law, Vol. 45, 2014. pp. 326–339.

[315] Similar conclusion is reached: Amy Lai: The Natural Right to Parody: Assessing the (Potential) Parody/Satire Dichotomies in American and Canadian Copyright Laws. Windsor Yearbook of Access to Justice, Vol. 35, No. 1, 2018. p. 78.

The explanatory memorandum[316] to Act XXXVII of 2021 also clarifies that the exception covers target and weapon parodies as well.

5. Conditions of the exception. As a starting point, it needs to be clarified that neither the InfoSoc Directive nor the CDSM Directive sets out specific conditions for the parody exception, but only the possibility or obligation to ensure free use. However, this does not and cannot mean that this specific free use is without limits.

This legislative solution can be traced back to the fact that the optional exceptions of the InfoSoc Directive served as a compromise list of free uses in the Member States (at the time of the adoption of the Directive), as a kind of common minimum. Although there are some similarities between the parody exceptions in the EU Member States (especially when it comes to neighbouring countries), there are a number of differences in the conditions, which are bridged by the generally worded parody exception provided for in the InfoSoc Directive,[317] which solution was also adopted by the CDSM Directive.

However, the CJEU's analysis in the Deckmyn case examined a number of conditions for the assessment of the exception and ruled out the applicability of a significant part of them, as set out below.

> "[…] *The concept of «parody», within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.*"[318]

In the CJEU's view, compliance with the parody exception can only be made conditional on the use evoking the original work and expressing humour or ridicule. This interpretation, as explained above, has been taken up by two EU Member States (Germany and France) and Canada by interpreting their existing exceptions in line with the Deckmyn decision, and this dual set of conditions is confirmed by expert opinion 07/19 of the CCE, as set out below.

> „*The Deckmyn decision of the European Court of Justice based on the cited provision of the Directive stated that a parody occurs when, on the one hand, the adaptation evokes the original work recognizably, even if it differs significantly,*

[316] The explanatory memorandum is available at: *https://www.njt.hu/jogszabaly/2021-37-K0-00*.
[317] Jonathan Griffiths: European Union copyright law and the Charter of Fundamental Rights – Advocate General Szpunar's Opinions in (C-469/17) Funke Medien, (C-476/17) Pelham GmbH and (C-516/17) Spiegel Online. International Review of Intellectual Property and Competition Law, Vol. 20, 2019. p. 36.
[318] Deckmyn paragraph [33].

and on the other hand, expresses humour or ridicule. It does not impose any other requirements on parody, so it can be used for commercial purposes, but it may not infringe on moral rights."[319]

During the transposition of the CDSM Directive, the task of Hungarian legislator was not to interpret an existing exception, but to create a new form of free use. Thus, the above explained dual system of conditions (evoking the original work and expressing humour or mockery) set out by the CJEU could not be disregarded during the codification of the exception. It was necessary to specify these conditions, failing which it would have been questionable whether the exception complied with EU law.[320] The regulation of these conditions was also justified in the sense that the introduction of the parody exception into Hungarian law was a new limitation on the exclusive rights of the author, so the condition could be also considered as a particularly important guarantee in the provision.

Moreover, a further narrowing of the exception was justified: neither the CJEU nor the relevant directives affect the right of adaptation, as the EU has not harmonized this economic right with regard to parody.[321] This provided an opportunity, in line with EU law, to limit the extent of borrowing from the original work to what is justified by the purpose to be achieved. In our view, the use of the term borrowing is not precluded by the fact that the term is used by HCA by another form of free use. Moreover, the definition in the second sentence of Section 34(2) of the HCA[322] is perfectly suited to achieving the objective of narrowing the parody exception, and distinguishing it from the quotation exception.

Finally, it is important to confirm the CCE's position in expert opinion 07/19, as quoted above, that the uses of parody fall within the scope of the exception, regardless of the commercial nature of the use.

6. Moral rights. Chapter III of this paper dealt in detail with the possible collisions between uses of parody and moral rights. Addressing this issue[323] is of paramount importance because, as indicated above, the infringement of moral rights infringes the legitimate interests of the author and thus fails to meet the conditions of the three-step test.[324]

In order to minimize the points of possible collision, it was necessary to restore the wording of Section 13 of the HCA which was in force between 1999 and 2013.[325] This stated

[319] CCE 07/19. point 2.
[320] Moreover, during transposition, EU Member States will – in principle – have to review the wording of their existing exceptions and bring them into line with the Deckmyn decision.
[321] Ana Ramalho: The Competence of the European Union in Copyright Lawmaking – A Normative Perspective of EU Powers for Copyright Harmonization. Springer, 2016. p. 188.
[322] HCA Section 34(2) "[…] Any use of a work in another work to an extent that exceeds quotation or citation shall constitute borrowing."
[323] See more: Thomas F. Cotter: Memes and Copyright. Tulane Law Review, Vol. 80, No. 2, 2005. p. 352.
[324] CCE 19/17.
[325] Békés – Mezei (2010) 20–21, Mezei (2014) 413, Paku (2019) 89, Sápi (2019a) 66–67. and Sápi (2019b) 151.

that a use only infringes the integrity right if it violates the author's honour or reputation (returning to the regulatory solution chosen by the Berne Convention). When restoring the interpretation of Section 13 of the HCA, it was necessary to update Section 75(2) of the HCA as well.

However, the amendment of Section 13 of the HCA in itself is not capable to fully resolve the issues raised by parodies,[326] as these uses often express hurtful, highly critical opinions.[327] In our view, – the freedom of expression contained in them should not be limited by the author's honour or reputation, but by the legal limits and framework of expression. Thus, in addition to the above, in our view, it would have been necessary to add a new provision (a second paragraph) to Section 13 of the HCA, which could have stated in connection with parody that the author may only invoke the integrity of the work if the use exceeds what is necessary and proportionate for freedom of expression.[328] This solution could have ensured that, in practice, the courts have the appropriate means to strike a balance[329] between the author's exclusive rights and freedom of expression in all cases. This approach was not supported during the public consultations of the amending Act, and thus did not made it to the HCA. Regardless, the explanatory memorandum to Act XXXVII of 2021 – based on the practice of French courts – states that the right to integrity suffers infringement only if the parody exceeds the legal framework of freedom of expression.[330] Hopefully, this will be enough to ensure that courts will have the means to strike an appropriate balance between exclusive rights and freedom of expression.

With regard to indication of name, it is also necessary to refer back to the position of the CJEU in Deckmyn that "*holders of rights* […] *have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message*",[331] so the final parody exception does not contain an obligation to indicate the source or the author's name.

[326] Daniel Clode: Power to the Artist: The False Promise of Moral Rights. A Journal of Policy Analysis and Reform, Vol. 5, No. 1, 1998. p. 125.
[327] George E. Marcus: The Debate over Parody in Copyright Law: An Experiment in Cultural Critique. Yale Journal of Law & the Humanities, Vol. 1, 1989. p. 310.
[328] Gyenge Anikó: A szerzői mű ára – díjak az egyedi felhasználási szerződésekben, 1. rész. Industrial Property and Copyright Review, 2014/6. Chapter I. Available at: *https://www.sztnh.gov.hu/hu/kiadv/ipsz/200412/01-gyenge-aniko.html*.
[329] Corinne Tan: Regulating Content on Social Media – Copyright, Terms of Service and Technological Features. UCL Press, 2018. p. 93; Christina Bohannan: Copyright Harm, Foreseeability, and Fair Use. Washington University Law Review, Vol. 85, No. 5, 2007. p. 970; Lai (2019) 145. and Deckmyn paragraph [27].
[330] See the explanatory memorandum to amending Article 8.
[331] Deckmyn paragraph [31].

VI. AN UNUSUALLY SHORT CONCLUSION

This paper aimed to summarize three mayor issues that typically arise when researching copyright law's approach to parody: EU law, moral rights and domestic solutions. These three questions were selected for this paper for two reasons: answers to them are sometimes very hard to find, even in the relevant studies, and some of them had a huge impact on the newly enacted parody exception of the HCA.

As we haves seen, EU law and the Deckmyn decision both had a major impact on the parody exception's final wording. The binary system of conditions (evoking the original work and expressing humour or mockery) and the dual authorization in the InfoSoc and CDSM Directives provide a firm but flexible foundation for the national legislator. The collision between moral rights (especially the right to integrity) and freedom of expression and the legal solution national copyright law provides also has a huge impact on how effective a parody exception may be in incentivising creativity. Hungarian legal literature's standpoint – and its evolution – may also serve as an interesting example on how adaptive copyright law is and how the legislator regulating this particular field of law must be always attentive and open to rebalancing the relevant interests.

It is our hope that gathering the Hungarian experiences and the factors that moulded the parody exception in its final form during the transposition efforts in a single study may help other countries when it comes to regulating – parody or other – exceptions in their national copyright law.

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I started to research the parody exception and Hungarian copyright law's standpoint on uses of parody in 2017. In that year, I gave a presentation at a conference organised by the Hungarian Industrial Property and Copyright Association. The theme of the presentation was an arctic expedition: people in fur coats, wearing copyright symbols (©) and holding the Hungarian flag (symbolising Hungarian copyright law) set off on an adventure to find the parody exception, which was missing for so long from the HCA. During the last few years, I also wrote and defended my doctoral thesis on parody.[332]

At long last, with Act XXXVII of 2021, Hungarian copyright law finally found the parody exception and the parody exception took its rightful place on 1 June 2021 in the Hungarian copyright regime. It is my sincere hope that the new exception will effectively serve its role to promote freedom of expression and provide a fertile and stable ground for incentivising creativity.

Finally, for this explorer, it is time to search for new frontiers to discover.

[332] Ujhelyi Dávid: A paródiakivétel szükségessége és lehetséges keretrendszere a hazai szerzői jogban. Ludovika Egyetemi Kiadó, Budapest, 2021.

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